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THE CONSERVATIVE WORLD OF MR. JUSTICE SUTHERLAND, 1883–1910*

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The Supreme Court of the United States was dominated for almost two decades by the philosophy of Mr. Justice Sutherland. Even prior to becoming an Associate Justice, October 2, 1922, he had been a figure of national prominence for over twenty years, serving one term as congressman, 1898–1900, and two terms as senator, 1905–1917. His retirement, January 16 of this year, closes the more active phases of a long career in public service. Throughout he has shown himself a man of firm convictions and pronounced views, whether expressed on the floors of Congress, in public addresses, or in Supreme Court opinions. Yet little, almost nothing, has been published on his life, thought, and work, as was contemporaneously done with respect to Justices Holmes and Brandeis.

This neglect of judicial biography has been noticed by Dean Charles E. Clarke of the Yale Law School. Writing in the *Nation* of June 12, 1937, he observed: "Many of the books which needed to be written on judicial supremacy have now been completed. The need for making available for laymen the researches of the scholars would seem to be fulfilled. This is not to say, however, that there are not many parts of the field yet deserving of careful research. There is possibility of brilliant promise in the tracing of the development of constitutional doctrine in the light of the personalities of the Justices."[1]

Justice Sutherland is as significant as Holmes or Brandeis, but

* Subsequent articles will appear in this REVIEW or elsewhere under the titles: "George W. Sutherland: Statesman and Philosopher" and "The Constitutional Principles of Mr. Justice Sutherland."

[1] Compare the cryptic remarks of Mr. Justice Cardozo in U.S. v. Constantine, 296 U.S. 287, at 299.

for different reasons. During his tenure, the Supreme Court nullified more constructive legislation than in any period of equal duration in our history. To do this, various canons of constitutional interpretation were reversed or superseded and judicial review was expanded to unprecedented scope. While paying verbal adherence to presumption in favor of constitutionality, Sutherland seemed in practice to substitute his own presumption of unconstitutionality. While expressly disclaiming authority to pass on the wisdom of any legislative policy, he, apparently in the absence of specific restrictive constitutional provisions, erected his own predilections into impassable constitutional barriers. With the reviewing power thus enlarged, the Court has built up since about 1890 a system of implied limitations upon the express constitutional powers of Congress, thus superseding John Marshall's doctrine of implied federal power.[2]

Influenced by Mr. Justice Sutherland, the Supreme Court continued to regard the Fifth and Fourteenth Amendments as tools for meticulous guardianship, confining federal and state power within successively narrower and narrower bounds. The result has been the virtual destruction of government within an ever-increasing area. This is not to infer absence of government and presence of freedom for all within this No Man's Land; but such rules and regulations as existed there were applied and enforced by private groups wielding a superior economic power which neither Congress nor the forty-eight states could effectively dispute. It was not until after February 5, 1937, that the Supreme Court took account of the fact that liberty can be, and is, interfered with by industrial corporations as well as by political government. As Chief Justice Hughes pointed out in the Jones-Laughlin case, under modern industrial conditions constitutional issues cannot be appropriately considered in "an intellectual vacuum."[3] Mr. Justice Sutherland dissented.

Clearly, Mr. Justice Sutherland deserves more attention than he has yet received. Under his guidance the Court has frustrated the power of government and continued the work, begun about 1890, of undermining the Constitution as conceived by the framers

[2] For ample support, see Edward S. Corwin, *The Twilight of the Supreme Court* (1934), and *The Commerce Power vs. States' Rights* (1936).

[3] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), at 41.

and as previously interpreted in scores of leading Supreme Court cases. Throughout this period, judicial persistence in the belief that judges alone can and must give ultimate answers in matters of social and economic policy evoked strong protest from dissenting justices, usually among the most highly respected members of the bench. By 1936, Justice Stone apparently considered it necessary to remind his conservative colleagues that "courts are not the only agency of government that must be assumed to have capacity to govern."[4] With the powers of government thus paralyzed, the authority and prestige of both Constitution and Court are inevitably diminished. From an instrument of positive authority, the Constitution tends to become a symbolic fetish to be used or abused, praised or blamed, in proportion as it helps or hurts professional politicians and special economic interests.

But it is not enough to relate what Sutherland said, thought, or did as statesman and judge. His words, thoughts, and actions fall into perspective only when projected against the intricate pattern of forces current during the period in which his philosophy crystallized. This pattern traces, as we shall see, the then dominant design of political, legal, and judicial dogma.

Sutherland began his legal career fifty years ago amid social, political, and constitutional conflicts still being waged, and of late with increased intensity. One observed then, as now, clashes of class interest, antagonisms among advocates bitter as the opposing groups for which they spoke. Little wonder that the same environment produced contrasts as antithetical as Henry Demarest Lloyd and William Graham Sumner, Marcus A. Hanna and Eugene V. Debs, Joseph H. Choate and Louis D. Brandeis, Chief Justice Waite and Justice Stephen J. Field. Yet, viewing this confused panorama of forces, one is impressed with a certain unity among the dominant economic, political, and legal conservatives. Combined in a single sector were the aggressive, exploitive, and militant types of economic-political behavior, the superficial calm and cold objectivity of judicial exegesis.

The first few years of Sutherland's practice were the end of an epoch; a new and revolutionary period in American economic and social life had begun. Free land being largely absorbed and the frontier closed, agriculture as the norm of American life was superseded by industrialism. The census of 1890 showed enormous

[4] U.S. v. Butler, 297 U.S. 1, at 87.

increases in manufactured articles since 1870, though manufacture had outstripped agriculture even earlier; the total product had greatly increased in value, and many more factory workers were employed. The drift from rural to urban regions was more pronounced; corporate forms of industrial organization were rapidly displacing co-partnership. Railway consolidation, even in its first stages, brought such advantages to the roads that combination became the order of the day. A similar integration of small industrial and commercial enterprises took place more slowly from 1870 to 1890, but the process was no less inevitable. John Randolph Tucker, lawyer, teacher, and publicist, devoted considerable attention to this development in his presidential address of 1893 before the American Bar Association:

> The rapid increase of those corporations, which, like the deities of ancient mythology, crown the hills and mountains, possess the forests and fields, the lakes and rivers of our great land, has caused them almost to monopolize the channels of our progressive industries, and to fill our statute books with cumbersome charters, and our law reports with voluminous discussions. But, lest the mills should grind too slowly, the states of late vested in the courts the legislative function, they are pleased to regard as judicial, of granting charters to private corporations for all sorts of enterprises.[5]

This transition from rural to urban life reeked with abuse. Industrial combinations engaged in all sorts of malpractice. There were industrial pools as well as railway pools, and with similar results. Financiers organizing combinations took fabulous profits. Officers, speculating entirely in their own interest, bought and sold the stocks of their own companies. The obvious alliance of business and politics became increasingly odious. Certain industrial corporations rivaled the railroads in controlling machine politics, the Standard Oil Company having "done everything with the Pennsylvania legislature except refine it."[6]

Publicists, trust-busters, and muckrakers were loud in invective; politicians and demagogues promised Square Deals, New Freedoms, and other utopias. But few understood the social and political significance of the changes then taking place. One who did so was Frederick J. Turner, who, on January 12, 1893, read before the American Historical Association his famous paper on "The Significance of the Frontier in American History."[7]

[5] 16 *Report of the American Bar Association*, p. 190.

[6] H. D. Lloyd, "Story of a Great Monopoly," *Atlantic Monthly*, March, 1881.

[7] Reprinted in F. J. Turner, *The Frontier in American History* (1921), Chap. 1.

Under pioneer conditions, if economic interests clashed, the defeated could pick up stakes and move on to areas where competition was less destructive. This was now at an end. Turner pointed out that with the passing of the frontier the westward movement was finished; the heretofore mobile, land-seeking American was due to settle down, but would not; instead he must and would press on in the frontier spirit and find other ways of meeting his needs despite a solidifying civilization.

The economic and political implications of Turner's thesis were developed in Henry Demarest Lloyd's *Wealth Against Commonwealth*, published in 1894. Lloyd's appraisal of the new order is unique both in depth and method of analysis. Paraphrasing the opening words of Rousseau's *Social Contract*, Lloyd said: "Nature is rich; but everywhere man, the heir of nature, is poor;"[8] "liberty produces wealth and wealth destroys liberty;"[9] "competition has killed competition;" "corporations are grown greater than the state and have bred individuals greater than themselves."[10] "Political government by the self-interest of the individual we call anarchy. It is one of the paradoxes of public opinion that the people of America, least tolerant of this theory of anarchy in political government, lead in practising it in industry."[11] "Politically we are civilized; industrially, not yet."[12]

Unlike Rousseau's idealistic and contradictory treatise of 1762, Lloyd's study made a venture in realism in a world of realities. His book was quarried from official records, decisions of courts, and special tribunals, such as the Interstate Commerce Commission, reports of committees of state legislatures and of Congress, oath-sworn testimony from legal proceedings, and official inquiries, with full and accurate references throughout. For grasp of the facts of the political-economic situation then taking shape, the volume is without an equal. The condition which Lloyd described was to him but a passing phase in the "evolution of Industrial Caesars." He prophesied that "Corporate Caesars" must become the dominant type of industrial tyrant, and he thus anticipated the corporate concentration and control described in Berle and Means, *The Modern Corporation and Private Property* (1933). The "naked issue," was precipitated, as Lloyd saw it in the early 'nineties, by a state of affairs in which property was "becoming master instead

[8] Lloyd, *Wealth Against Commonwealth* (1894), p. 1. [9] *Ibid.*, p. 2.
[10] *Ibid.*, p. 494. [11] *Ibid.*, p. 496. [12] *Ibid.*

of servant, property in many necessaries of life becoming monopoly of the necessaries of life."[13]

Few understood that the frontier spirit would not end with the absorption of western lands. Turner and Lloyd knew it would live on and subdue new fields; they knew that "the economic interest ending in material things could take precedence only temporarily in the open spaces, and as these regions filled up the political phases of the struggle were bound to gain the ascendancy."[14] Getting ahead in the world could not thenceforth mean struggle with nature; it would mean struggle with and triumph over other people.

As the whole pattern of American life thus underwent fundamental change, promoters, exploiters, monopolists, and trust magnates pushed aggressively for the places of power in our new economic society. The rise of industrialism was accompanied by unprecedented disorder, storm, and stress. "The American way of life," in its new manifestations, proceeded apace, but not without challenge. Historians note the Molly Maguires, the Haymarket riots (1887), the panic of 1893, the Pullman strike (1894), the Chicago Stock Yards strike, and Coxey's Army (1894), to mention only a few. Nor was there lack of peaceful effort to cope with the problems and abuses of this new industrialism. The 'seventies, 'eighties, and 'nineties saw new movements offering all sorts of legislative and other panaceas. There were Grangers, Greenbackers, Farmers' Alliance, Populists, Knights of Labor, a variety of Socialist parties, the Henry Georgeites, the American Federation of Labor, and others. Against the ever-increasing concentration of wealth and power in fewer and fewer hands, with the evil consequences attending it, popular movements on a wide front sought from government, state and federal, economic and social relief. The call for legislation went out from all parties. As abuses spread and suffering became more intense, government, as an instrument of political democracy, undertook to regulate and control our new industrial and financial autocracy.

As early as 1872, the labor reformers condemned western capitalists for importing Chinese labor. In the same year, both Republican and Democratic parties opposed further grants of public land to corporations and monopolies. The Greenbackers in 1880, and the anti-Monopolists, Prohibitionists, and Democrats in 1884,

[13] *Ibid.* [14] F. H. Knight, *Ethics of Competition* (1935), p. 291.

denounced corporations and called for government action to abolish or control their power. The Union Labor, Prohibitionist, and Republican parties in 1888 urged legislation abolishing or regulating both trusts and monopolies. Public opinion against monopolies was already deeply rooted in the economic and social convictions of the American people. State legislatures and Congress responded to these sentiments. Eight states passed anti-trust laws by 1890, and several enacted laws regulating grain elevators, public utilities, liquor traffic, the insurance business, labor conditions, the manufacture and sale of oleomargarine, etc.[15] Significant federal enactments were the Interstate Commerce Act of 1887, the Sherman Anti-Trust Act of 1890, and the Income Tax Law of 1894. Addressing the American Bar Association in 1891, Frederick N. Judson of the St. Louis bar, a leading exponent of the constitutional doctrine of *laissez-faire*, anticipated that legislation of this nature, abridging the right of private contract, "must tend greatly to increase" because "the denial of free contract seems with many agitators to be the great panacea for social ills, and oftentimes the first manifestation of the strength of a voluntary labor association is in denying *vi et armis* the right of free contract on the part of others."[16]

To shift from legislating for the few to legislating for the many, to transfer emphasis from the doctrine of *laissez-faire*, under which industrialism had flourished, to a social philosophy which took cognizance of human welfare and social justice, seemed to sincere men to reverse the very currents which were sweeping the nation on to a permanent prosperity. The emergence of industrialism left American economic and political thought singularly unchanged. Against such new legislation arose cries for unrestricted competition, the demand that government, state and federal, should not intrude, interfere, or undertake to regulate "free enterprise."

For justification of the abuses that attended the rise of industrialism—oppression of the masses by powerful vested interests, exploitation of natural resources, ruthless competition, etc.—one need only turn to the writings of *laissez-faire* professors, the briefs and public addresses of lawyers, court opinions, or the voices of the market place. Economic activity, all said, is governed by laws

[15] For a survey of such legislation, see F. N. Judson, "Liberty of Contract Under the Police Power," 14 *Report of the American Bar Association* (1891), p. 231.

[16] *Ibid.*, p. 256.

of its own; so long as government does not interfere with it, save against interlopers, these laws work inevitably for universal human betterment. In any event, the lawyers held that "legislation is as powerless to permanently affect the law of supply and demand as it is to affect the law of gravitation."[17] During an investigation of a coal combination in 1893, a congressional committeeman declared it to be "a law of business for each proprietor to pursue his own interest. There is no hope for any of us, but the weakest must go first."[18] In the same year, Mr. Justice Brewer interrupted his work on the Supreme Court to tell the New York State Bar Association that:

> It is the unvarying law that the wealth of the community will be in the hands of the few; and the greater the general wealth, the greater the individual accumulations. The large majority of men are unwilling to endure that long self-denial and saving which makes accumulation possible; they have not the business tact and sagacity which bring about large combinations and great financial results; and hence it always has been, and until human nature is remodeled always will be true, that the wealth of a nation is in the hands of a few, while the many subsist upon the proceeds of their daily toil.[19]

Likewise, in 1893, Henry Billings Brown, Associate Justice of the Supreme Court, discussed *The Distribution of Property:*

> While enthusiasts may picture to us an ideal state of society where neither riches nor poverty shall exist, wherein all shall be comfortably housed and clad, and what are called the useless luxuries of life are unknown, such a utopia is utterly inconsistent with human character as at present constituted; and it is at least doubtful whether upon the whole it would conduce as much to the general happiness and contentment of the community which excites the emulation and stimulates the energies, even if it also awakens the envy, of the less prosperous. Rich men are essential even to the well-being of the poor. . . . One has but to consider for a moment the immediate consequences of the abolition of large private fortunes to appreciate the danger which lurks in any radical disturbance of the present social system.[20]

Justice Brewer had noted a "movement of coercion," and urged lawyers and judges to be on guard against "the improper use of labor organizations to destroy the freedom of the laborer and control the use of capital. He especially deplored

> the assumption of control over the employer's property, and blocking access of laborers to it . . . It is a proceeding outside of the law, in de-

[17] H. B. Brown, "The Distribution of Property," 16 *Report of the American Bar Association* (1893), p. 225.

[18] Quoted in H. D. Lloyd, *Wealth Against Commonwealth* (1894), p. 495.

[19] *The Movement of Coercion*, p. 5.

[20] Brown, *op. cit.*, pp. 218–219.

fiance of the law, and in spirit and effect an attempt to strip from one that has, that which of right belongs to him—the full and undisturbed use and enjoyment of his own . . . It is the attempt to give to the many a control over the few—a step toward despotism.

Justice Brewer also condemned the "coercive" participation of government:

The other form of this movement assumes the guise of a regulation of the charges for the use of property subjected, or supposed to be, to a public use. This acts in two directions: one by extending the list of those things, charges for whose use the government may prescribe. . . . And second, in so reducing charges for the use of property, which in fact is subjected to a public use, that no compensation or income is received by those who have so invested their property. By the one it subjects all property and its uses to the will of the majority; by the other it robs property of its value.[21]

The eminent Justice posed the question "whether, in view of the exigency, the functions of the judiciary should be strengthened and enlarged, or weakened and restricted." He took account of the fact that those who wished to further this movement "are unanimous in crying out against judicial interference, and are constantly seeking to minimize the power of the courts;" they seek to create the belief that "judges are not adapted by their education and training to settle such matters." Brewer, however, reasoned:

The great body of judges are as well versed in the affairs of life as any, and they who unravel all the mysteries of accounting between partners, settle the business of the largest corporations and extract all the truth from the mass of sciolistic verbiage that falls from the lips of expert witnesses in patent cases, will have no difficulty in determining *what is right and wrong between employer and employees, and whether proposed rates of freight and fare are reasonable as between the public and the owners; while as for speed, is there anything quicker than a writ of injunction?*[22]

[21] Brewer, *op. cit.*, at 5–7.

[22] *Ibid.*, pp. 8–9. Italics mine.

Brewer offered other reasons for judicial preëminence: "Somehow or other men always link the idea of justice with that of judge. It matters not that an arbitrator or commission may perform the same function, there is not the same respect for the office, nor the same feeling that justice only can be invoked to control the decision. . . . It is a good thing that this is so; that in the common thought the idea of justice goes hand in hand with that of judge. . . . I would have it always kept so. . . . " (pp. 9–10). A somewhat different contemporaneous view of judicial competence and the effects of judicial supremacy is given by the conservative economist, R. T. Ely: "We have, to an extent unknown in any other country in the world, government by judges. What does this mean to the student of social legislation? It means a great deal, and the fact cannot be disguised. It means a force on the whole adverse to the interests of labor. . . . The only practicable remedy in the United States seems to

Brewer was concerned lest the mischief-makers in this movement "get away from courts and judges, and place the power of decision in the hands of those [commissions and administrative bodies] who will the more readily and freely yield to the pressure of numbers, that so-called demand of the majority." What, then, ought to be done? His answer was unequivocal—"strengthen the judiciary."[23] Much the same answer had been given two years previously by Frederick N. Judson:

> Social and economic conditions . . . within the past few years . . . have forced into public and judicial discussions, as never before, the relation of the fundamental rights of the individual to the police power of the State. It is now not the question of what constitutes "due process of law" but the limits of State authority in the exercise of the legislative discretion as to the requirements of the public welfare, in abridging the citizen's liberty, or denying him the use of his property, without any process.
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> The stress of competition in business, the prevailing social unrest, the distinct trend of a certain class of social agitators in the direction of State socialism, the superstition that legislation is a sovereign cure-all for social ills, and last, but by no means least, the competition of reckless politicians for the unthinking vote, all are potent factors in inducing legislation, which is forcing upon the attention of our profession and the courts a new class of constitutional questions, and signs are not wanting that these are to be the weighty questions of the future in jurisprudence, as well as in social economics.[24]

The legal profession left no one in doubt as to its stand on such issues. The bar entertained "one simple rule about industry, that it should be free"[25]—free from social legislation, and from the coercion of organized labor.

> The vice of the so-called social legislation denying freedom of contract is that it deprives the individual of his "personal rights" and subjects him to the only tyranny which in this democratic age is possible. . . . The force antagonizing "personal rights" is not the "right of property," but the power of the State exercised in the abridgment of individual liberty.[26]

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be a broader, more liberal, and more thorough education of the lawyers who are our ruling class. At the present time, the training which our lawyers receive is as a rule woefully deficient and cannot entitle them as a whole to the rank of a liberal profession. The condition of the legal education in this country becomes apparent when it is stated that the politic and economic science implied and expressed in Blackstone's *Commentaries on the Laws of England* is still regarded as sound doctrine by at least nine American lawyers out of ten." *Economic Review*, April, 1891.

[23] Brewer, *op. cit.*, p. 10.

[24] *Op. cit.*, at p. 232. Compare with Herbert Spencer's *Man vs. the State*, particularly the chapter entitled "The Sins of Legislators." J. W. Cary, 15 *Report of American Bar Association* (1892), p. 245, reached much the same conclusion and urged broader judicial review.

[25] Judson, *op. cit.*, p. 236, *supra*, note 15.

[26] *Ibid.*, p. 259.

The inevitable concentration of wealth and power in the hands of the few seems never to have been regarded by the legal profession as a threat to freedom. Liberty had no enemy other than the political; they ignored liberty's economic foe except as "big" business might affect small industrialists. The thing especially to be feared was the sheer force of numbers, of majorities, whether in the ranks of labor or in legislative bodies. Thus Judson reminded the bar of "the duty" which "devolves primarily upon our profession" to preserve the "Constitution." John Randolph Tucker appealed: "Brother lawyers of America"! "Don your armor. Shield the proud Templar of Misrule, and challenge his power."[27]

The sources of such doctrine are not found in the Constitution. To discover their origin, we must turn from America to England and to the writings of Herbert Spencer. And the roots of Spencer's political "wisdom" (as Justice Brewer characterized it, classifying him with Plato)[28] are not in political but in natural science. His evolutionary and political doctrines emerge in his *Social Statics* of 1851 as he describes the universal warfare among lower animals and shows that "an average of benefit" results therefrom. This struggle for existence, Spencer argued, leads to survival of the fittest, and if permitted to run unhindered would ultimately develop a being so perfectly adapted to environment as to be capable of the highest happiness. But government can do nothing to hasten this result. "The poverty of the incapable, the distresses that come upon the imprudent, the starvation of the idle, and those shoulderings aside of the weak by the strong, which leave so many 'in shadows and miseries,' are the decrees of a large, far-seeing benevolence."[29] Those who succeed in the economic and political struggle are the strongest; they alone are capable of the highest happiness; government exists to protect them in whatever possessions and places of power they are able to get, albeit at the expense of the weaker. With Providence thus identified with the heartless and cruel "order of nature," it follows that certain natural rights of the individual must be free from state control. Liberty itself is measured "by the relative paucity of the restraints it imposes."[30] Spencer's rule as to industry is thus identical with that of American lawyers and judges forty years later.

We were told by Justice Holmes in 1905 that the Constitution

[27] 14 *Report of the American Bar Association* (1892) p. 244. [28] *Op. cit.*, p. 1.
[29] *Social Statics* (1851), p. 322. [30] *Man vs. the State* (1884), p. 16.

"does not enact Mr. Herbert Spencer's *Social Statics*."[31] But one may observe that Holmes was then protesting a judicial ruling based not upon the Constitution but, as he himself said, "upon an economic theory." And though the Justice may have been correct in believing that "a large part of the country does not entertain" that theory, nevertheless five of his colleagues had in fact already done so in deciding the case at bar. For them, the Spencerian doctrine of 1851 was the authentic Constitution of 1905, and not the document of 1789. In this revolution, obviously the lawyers (the "adjuncts of great corporations," as Brandeis characterized them) had taken the lead. Protesting this new constitutionalism of his colleagues, Mr. Justice Holmes observed:

> A Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez-faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[32]

Holmes expressed merely a vain hope. Spencer's ideas had been, in fact, Americanized by William Graham Sumner, who argued as fiercely as the lawyers and judges themselves for freedom of contract and other sacred prerogatives of the "free" man in a "free" society, existence of which was assumed in these United States. Such was the golden, or brazen, rule of business which, under the *laissez-faire* philosophy of government and law that sustained it, weighted the economic scales so heavily in favor of Armour, Harriman, Morgan, Rockefeller, and Schwab.

At the turn of the century, as now in certain quarters, the philosophy of pioneer America was still held valid, although the foundations of the theory had been undermined. Lawyers and judges were particularly disinclined to see the facts of social and economic life and to seek ways whereby the law and the Constitution might be harmonized therewith. For them, government and law were unrelated to social problems. Business leaders, lawyers, and judges convinced themselves that grave issues concerning the economic and social conditions of the masses must somehow be kept out of court. Law could not be viewed as purposing social justice; it could not be utilized as an instrument in its service. One of the ablest and most influential lawyers of this period, Joseph H.

[31] Lochner v. New York, 198 U.S. 45, at 75. [32] *Ibid.*, p. 76.

Choate, had acted as counsel in the Income Tax Cases and successfully put large incomes beyond the reach of national taxation for almost twenty years. Invited in 1907 by the attorney-general of Oregon to join in defending the ten-hour law for women, he declined courteously, saying that he could see no reason why "a great husky Irish woman should not work in a laundry more than ten hours in one day, if her employer wished her to do so."[33] "As between persons *sui juris*, what right has the legislature," one state court judge asked, "to assume that one class has the need of protection against another?"[34] As violating a theoretical concept of equality, of liberty, legislation designed to give some economic self-determination to workers in industry was regarded as paternalistic, arbitrary, and unconstitutional, belittling their intelligence and lowering their standing as free citizens.

To the mind of lawyers, conditions for thrifty American workmen were as good as could be desired. Employers had generously supplied them with physical and cultural advantages, and such paternalism, strangely enough, did not detract from their freedom. At a time when labor organizations were in their infancy, and assertion of the right of collective bargaining was stifled, Justice Brown entertained this view of the employer-employee relationship:

> He [the laboring man] not only practically dictates his own hours of labor, but in larger manufacturing centers he is provided with model lodging houses for his family, with libraries, parks, clubs, and lectures for his entertainment and instruction . . . and not only absolutely but relatively to the rich is vastly better off than he was fifty years ago.
>
> Indeed, it is not too much to say that the American workingman who does not own his own home must charge it to his own idleness and improvidence, or to other circumstances usually within his own control.[35]

Contemporary facts do not support such views. As the workers' landlord, the Pullman Company, for example, collected rent, supplied water and gas, accepted savings in its bank, and permitted the use of its library at twenty-five cents a month. But the workers were dissatisfied with such ubiquitous guardianship because of overcrowded tenements, inadequate plumbing facilities, and exces-

[33] Communication of Florence Kelley, *The Survey*, May 13, 1916.

[34] State v. Haun, 61 Kan. 146, 162 (1899). For a good discussion of similar cases, see Roscoe Pound, "The End of Law as Developed in Legal Rules and Doctrines," 27 *Harv. Law Rev.*, 195 (1914).

[35] H. B. Brown, *op. cit.*, at 220.

sive rents.[36] Certain other corporations under the "truck system" ran stores, presumably for the advantage and convenience of employees. But a congressional committee which investigated conditions in Pennsylvania in 1888 found that prices in the company stores ran from ten to thirty per cent higher than in other stores in the vicinity, and that workers felt obliged to trade with the company lest they lose their jobs.[37] Walter A. Wyckoff's realistic, first-hand, contemporaneous study shows the suffering which, night after night and day after day, faced thousands upon thousands of homeless, hopeless workingmen in the great cities of our "prosperous" country.[38]

Nor need it be supposed that such disregard of the facts of a changing social order was confined to lawyers, state court judges, and public addresses of the Justices. The alignment of the Supreme Court with big business and economic power is demonstrated by three cases decided in the October term of 1894. In the Sugar Trust Case,[39] Chief Justice Fuller admitted the existence of monopoly in conceding that the American Sugar Refining Company, through the purchase of the stock of four Philadelphia refineries with shares of its own stock, had "acquired nearly complete control of the manufacture of refined sugar in the United States."[40] Nevertheless, the Sugar Trust was allowed to escape the clutches of the law on the theory that "commerce succeeds to manufacture, and is not a part of it"[41]; that the business of sugar refining in Pennsylvania "bore no direct relation to commerce between the states or with foreign nations."[42] Yet the Sherman law against trusts could not have been more explicitly, more drastically, phrased:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is . . . illegal.
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize

[36] Samuel Yellen, *American Labor Struggles* (1936), pp. 101–135; and see also *Report on the Chicago Strike of June–July, 1894, by the United States Strike Commission*, 53d Cong., 3d Sess., Ex. Doc. No. 7. For a brief and balanced treatment of the whole period, see Mark Sullivan, *Our Times*, pp. 254–371.

[37] *Labor Troubles in the Anthracite Regions of Pennsylvania, 1887–1888*, House Reports, 50th Cong., 2d Sess., Vol. IV, p. lxxix.

[38] *The Workers, an Experiment in Reality; The West* (1898).

[39] U.S. v. E. C. Knight, 156 U.S. 1 (1895). [40] *Ibid.*, at 9.

[41] *Ibid.*, at 12. Seven years previously, John Randolph Tucker had developed this construction of the commerce clause. See "Congressional Power over Interstate Commerce," 11 *Report of American Bar Assoc.*, p. 247, especially p. 258 *et seq.*

[42] *Ibid.*, at 17.

or combine or conspire with any other such person . . . to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of misdemeanor.

All this was emasculated by the Supreme Court—first, by narrow construction of the commerce clause, as in the Sugar Trust Case, and second, by the "rule of reason," outlawing only those combinations which in the mind of the Court restrained trade unreasonably. This construction of the Sherman Act was strongly urged in 1897 by Justice White and three dissenting colleagues (Field, Shiras, and Gray).[43] The Court then rejected it. When Justice White and his "rule of reason" finally triumphed in 1910, Justice Harlan underscored these dissenting words:

> We are asked to read into the act *by way of judicial legislation an exception that is not placed there by the lawmaking branch of the government*, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language used. This we *cannot and ought not to do*.[44]

Nevertheless, what the Court could not do in 1897, and ought not to have done in 1910, was accomplished. In so doing, the Judiciary usurped, as Justice Harlan declared, the constitutional functions of the legislative branch of the government; "by mere interpretation [the Court] modified the act of Congress, and deprived it of practical value against the evils to be remedied."[44a] Furthermore, the effect of the rule of reason, as President Taft then said, "is to thrust upon the courts a burden they have no precedents to enable them to carry, and to give them a power approaching the arbitrary, the abuse of which might involve our whole judicial system in disaster."[45]

It remained for the lawyers to supply new forms of business organization, not to be apprehended under the law as judicially amended; and the confidence which F. N. Judson had expressed in their ability proved to be well founded:

> The importance of this class of legislation [anti-trust] . . . is lessened by the facility of combination afforded by the corporation laws of the different states, and it seems probable that the form of organization at which it was primarily aimed will soon disappear.[46]

[43] U.S. v. Trans-Missouri Freight Assoc., 166 U.S. 290 (1897).

[44] 221 U.S. 1 (1910), at 88. [44a] *Ibid.*, at 99.

[45] 45 *Cong. Record*, 382 (1910). Quoted in R. H. Jackson and E. Dumbauld, "Monopolies and the Courts," 86 *University of Pennsylvania Law Rev.* (1938), p. 245, note.

[46] *Op. cit.* (*supra*, note 15), p. 253. In the same year (1891), Judson anticipated that the Court might expand its own power under this statute. "The so-called anti-

Yet the Sherman Law, along with the Interstate Commerce Act, ironically enough, seriously jeopardized labor's rights from the very beginning; and in 1908 the Supreme Court held the Danbury hatters liable to threefold damages under the Anti-Trust Act for having "conspired," in the course of a trade dispute, to interfere with the plaintiff's business.[47]

The Court undertook to correct in the Income Tax Cases[48] what it characterized as "a century of error," but in so doing five judges nullified a power of Congress which the Court had unanimously upheld in 1880.[49] The judges who voted with the majority, as well as those who expressed their views in dissent, spoke with marked feeling. Closely following Choate's brief, Justice Field condemned the income tax as "but the beginning" of an "assault upon capital" which was bound to continue "till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness."[50] He feared this impending struggle and considered it the function of the judiciary to stop such legislation, and thus prevent the kind of class war which the Income Tax Law, as he saw it, engendered and encouraged.

Judges in dissent were as much disturbed, but for different reasons. They all agreed that this decision of five judges dealt a severe blow to the safety and stability of American institutions—"the most disastrous blow ever struck at the constitutional power of Congress," as Justice Jackson expressed it.[51]

Justice Harlan, also dissenting, said:

> The decree now passed dislocates—principally for reasons of an economic nature—a sovereign power expressly granted to the general government and long recognized and fully established by judicial decision and legislative action. . . . The practical effect of the decision today is to give to certain kinds of property a position of favoritism and advantage inconsistent with the fundamental principles of our social organization, and to invest them with power and influence that may be perilous to that portion of the American people upon whom rests the larger part of the burdens of the government, and who ought not to be subjected to the dominion of

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trust laws enacted by a number of states in the past few years constitute another instance of the exercise of police power abridging the liberty of private contract. . . . Under the modern rule regarding such contracts, an interesting question would be presented as to the conclusiveness of the legislative determination of the necessity for such enactments in protecting the people against injurious monopolies." Pp. 252–253.

[47] Loewe v. Lawlor, 208 U.S. 274 (1908).

[48] Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895), and 158 U.S. 601 (1895).

[49] Springer v. U.S., 102 U.S. 586.

[50] 157 U.S. 429, at 607.

[51] 158 U.S. 601, at 706.

aggregated wealth any more than the property of the country should be at the mercy of the lawless.[52]

Justice Brown, strangely enough, regarded the decision as a "confession of feebleness" which "may prove the first step toward the submergence of the liberties of the people in a sordid despotism of wealth." For him it

> involves nothing less than a surrender of the taxing power to the money class. By resuscitating an argument that was exploded in the Hylton case, and has lain practically dormant for a hundred years, it is made to do duty in nullifying, not this law alone, but every similar law that is not based upon an impossible theory of apportionment. Even the spectre of socialism is conjured up to frighten Congress from laying taxes upon the people in proportion to their ability to pay them. It is certainly a strange commentary upon the Constitution of the United States and upon a democratic government that Congress has no power to lay a tax which is one of the main sources of revenue of nearly every civilized state.[53]

Justice White emphasized both the political and constitutional significance of the case:

> Since the Hylton case was decided, the Constitution has been repeatedly amended. The construction which confined the word "direct" to capitation and land taxes was not changed by these amendments, and it should not now be reversed by what seems to me to be a *judicial amendment of the Constitution.*[54]
>
> Let it be felt that on great constitutional questions this Court is *to . . . determine them all according to the mere opinion* of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people.[55]

This income tax decision was reached by evoking "the spectre of Socialism,"[56] of "Communism on the march," by raising the fear that unless this march were stopped then and there, taxes might soon be imposed by a "board of 'walking delegates'."[57] The Court therefore felt in duty bound to "save" the Constitution by injecting therein its own political theory. Doubtless Justice Holmes, in 1913, had this decision, among others, in mind as he wrote: "When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear was translated into doctrines that had no proper place in the Constitution or the common law."[58]

[52] *Ibid.*, at 685. [53] *Ibid.*, at 695.
[54] 157 U.S. 429 (1895), at 639. Italics mine. [55] *Ibid.*, at 652. Italics mine.
[56] Language of Justice Brown, 158 U.S. 601, at 695.
[57] Language of Justice Field, 157 U.S. 429, at 607.
[58] 62nd Cong., 3rd sess., Sen. Doc., Vol. XXV, No. 1106.

It also came to pass in 1895 that if property was threatened with mob violence, there was available for its protection every resource of national executive, military, and judicial power. But the chief significance of the Debs case[59] lies in the enlarged scope given to both executive and judicial power. Under this decision, the executive could appeal to federal courts of equity for an injunction to protect any widespread public interest of a proprietary nature under control of, or perhaps important to, the national government. The controversy arising out of the Debs case was, essentially, political. It raised the question of the wisdom of that policy of government whereby courts of equity are invoked to break up strikes and other labor activities. Dissenting twenty-six years later in Truax v. Corrigan, Mr. Justice Brandeis observed:

> The equitable remedy, although applied in accordance with established practice, involved incidents which . . . endangered the personal liberty of wage-earners . . . the real motive in seeking the injunction was not ordinarily to prevent property from being injured nor to protect the owner in its use, but to endow property with active, militant power which would make it dominant over men. In other words, that, under the guise of protecting property rights, the employer was seeking sovereign power. And many disinterested men, solicitous only for the public welfare, believed that the law of property was not appropriate for dealing with the forces beneath social unrest; that in this vast struggle it was unwise to throw the power of the state on one side or the other according to principles deduced from that law; that the problem of control and conduct of industry demanded a solution of its own; and that, pending the ascertainment of new principles to govern industry, it was wiser for the State not to interfere in industrial struggles by the issuance of an injunction.[60]

These precise words might well have been used in disposing of the Debs case twenty-six years earlier. Nevertheless, employers had increasingly sought protection from equity courts. Had not Justice Brewer discovered, two years prior to the Debs case, the great merit of the injunction—from the employer's point of view—"as for speed, is there anything quicker than a writ of injunction?" So, following the Debs case the injunction became the most important instrument in the enforcement of the "law" in labor cases. True, labor has achieved certain legislative immunities from the injunction incubus, but they may yet be judicially emasculated or constitutionally banned.[61]

Labor suffered another judicial set-back in 1908 when five

[59] 158 U.S. 564 (1895). [60] 257 U.S. 312 (1921), at 366–368.

[61] See, in this connection, my article "Labor and Judicial Interpretation," 184 *Annals of Amer. Acad.* (March, 1936), p. 115 *ff.*

judges invalidated, on technical grounds, the Federal Employer's Liability Act of 1906.[62] Justices Holmes, Harlan, Moody, and McKenna dissented, insisting that since it was possible to read the words of the statute in such a way as to save its constitutionality, this well-established rule should have been followed. In the same year, the Supreme Court legalized "yellow dog" contracts by setting aside Section 10 of the Erdman Act which made it a misdemeanor for a carrier engaged in interstate commerce to discriminate against any employee because of union membership.[63] To Justice Harlan, speaking for the Court, "employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with liberty of contract which no government can legally justify in a free land."[64] The decision rested on no more solid foundation than this controversial assumption of equality as between employer and employee. As Justice Holmes said in dissenting:

> The ground on which this particular law is held bad is not so much that it deals (as the majority insisted) with matters remote from commerce among the States, as that it interferes with the paramount individual rights secured by the Fifth Amendment. The section is, in substance, a very limited interference with freedom of contract, no more . . . The section simply prohibits the more powerful party to exact certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds against those already employed. . . . Where there is, or generally is believed to be, an important ground of public policy for restraint the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued. . . . I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large.[65]

Mr. Justice Harlan and four of his colleagues were more confident of their ability to say what policy was good for labor, the roads, and the country. They disagreed with the act on grounds of policy, and so set it aside, claiming, however, that Congress had exceeded its power under the commerce clause of the Constitution.

Meanwhile, the scope of judicial review under the due process clause of the Fourteenth Amendment had been greatly expanded. In the Slaughter-House Cases of 1873, the Court had indicated its purpose to regard "due process" in the future, as in the past, merely as demanding certain procedural requirements. Here the Court expressly denied any intention of becoming "a perpetual

[62] 207 U.S. 463.
[63] Adair v. U.S., 208 U.S. 161.
[64] *Ibid.*, at 175.
[65] *Ibid.*, at 191–192.

censor upon all legislation of the states."[66] As for the equal protection clause, Justice Miller doubted whether it would ever be invoked in any case not involving the Negro. But by 1900 the Court no longer hesitated to construe the due process clause as a substantive limitation on state legislative power, and the number of cases arising under the equal protection clauses, other than those involving the Negro, was constantly increasing.

Under Chief Justice Waite (1874–88), the attitude of the Court was marked by judicial toleration of state acts dealing with economic and social conditions. This view was clearly stated in the case of Powell v. Pennsylvania.[67] Facts presented by opposing counsel to show that the law did not really protect the public health drew this statement from Mr. Justice Harlan, speaking for the Court:

> . . . As it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. . . . The legislature of Pennsylvania . . . we must conclusively presume . . . has determined that the prohibition of the sale of [oleomargarine] . . . will promote the public health, and prevent frauds in the sale of such articles.[68]

Under this doctrine of judicial toleration, the Court had sustained during the decade 1876–86 a considerable body of social legislation. Usury and granger laws, Sunday observance, lottery prohibition, and liquor regulation were all upheld as legitimate exercise of the police power. The Court acknowledged broad legislative discretion in dealing with social and economic problems. It presumed the constitutionality of such legislation, and refused to take responsibility for abuses. Even in 1903, the Court, speaking through Justice Harlan, reasoned as follows:

> . . . If it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that

[66] 16 Wall. 36 (1873), at 73.
[67] 127 U.S. 678 (1888).
[68] *Ibid.*, at 685–686.

it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizens against mere arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactment should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution.[69]

But it is evident, on the whole, that the Court was veering from narrow to broad review of contested legislative policy. For in 1887 only Justice Field dissented; in 1903, Chief Justice Fuller and Justices Peckham and Brewer were in the minority, they having come on the bench since the earlier decision. Indeed, ominous warning of a judicial ban on social legislation had been sounded in Mugler v. Kansas in 1887. The Court here upheld the state prohibition statute involved, but Justice Harlan's words leave nothing to conjecture as to the Court's intention to become a legislative censor:

> The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.[70]

Such views cannot be made to conform with those which the Justice stated a year earlier in Powell v. Pennsylvania. Evidently Justice Harlan had been impressed with Mr. Joseph H. Choate's brief for appellee, and especially his words of caution: "It should be borne in mind that 'constitutional provisions for the security of *persons and property should be liberally construed.*' It is the duty of the courts to be watchful of constitutional rights and 'against any stealthy encroachments thereon.' "[71] The authority cited for this proposition is Boyd v. United States (116 U.S. 635), which had, to say the least, little bearing on the constitutional issue involved in the case at bar. Better authority for Choate's position could have been found in the words of Senator Roscoe Conkling, who had pointed out a few years earlier that the committee (of which he was a member) drafting the Fourteenth Amendment had in-

[69] Atkin v. Kansas, 191 U.S. 207 (1903), at 224.

[70] 123 U.S. 623 (1887), at 661.

[71] *Ibid.*, at 646. Italics mine.

tended to comprehend within its scope not only the Negro, but also corporations and business interests struggling for emancipation from legislative interference. Arguing before the Supreme Court in 1882, Conkling had observed:

> At the time the Fourteenth Amendment was ratified, individuals and joint stock companies were appealing for congressional and administrative protection against invidious and discriminating state and local taxes. . . . Those who devised the Fourteenth Amendment . . . planted in the Constitution a monumental truth to stand foursquare to whatever wind might blow. That truth is but the Golden Rule, so entrenched as to curb the many who would do to the few as they would not have the few do to them [72]

The Court's acceptance of Conkling's view, that the word "person" as used in the Fourteenth Amendment includes corporations, was highly significant. It meant thereafter that corporations, by alleging that state legislation denied them "due process" or "equal protection" of the laws, could get their cases into the federal courts. The Supreme Court was thus enabled to substitute its own view of the reasonableness of state statutes for that of the state courts, seriously impairing the power of the state to deal with corporation abuses.

Still other subtle forebodings as to the fate of progressive legislation may be inferred from the majority opinion in Holden v. Hardy in 1898, where an eight-hour law for underground miners was sustained. Accepting the definition of liberty rejected by the Court in Munn v. Illinois,[73] and proceeding upon the theory that such

[72] Quoted in B. B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction*, 39th Cong., 1865–1867 (1914), pp. 32, 34. Conkling represented the defendants in San Mateo County v. Southern Pac. R. R., 116 U.S. 138 (1885), which was pending before the Supreme Court from the fall of 1882 to the spring of 1885. Conkling's construction of the word "person" in the Fourteenth Amendment as comprehending corporations was accepted in Santa Clara County v. The Southern Pac. R.R., 118 U.S. 394 (1886); Pembina Mining Co. v. Pa., 125 U.S. 181 (1888); Minn. and St. Louis R.R. Co. v. Beckwith, 129 U.S. 26 (1889).

[73] Justice Field, dissenting in the Munn case, gave this definition of liberty: It means something more than "mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give them their highest enjoyment." 94 U.S. 113 (1876), at 142. In Allgeyer v. Louisiana, 165 U.S. 578, where the Court set aside a state statute regulating insurance companies as in violation of the due process clause of the Fourteenth Amendment, Justice Peckham defines liberty thus: "The liberty mentioned in that amendment means not only the right of a citizen to be free from mere physical restraint of his person, as by incarceration, but

liberty is fixed and definite, the Court (speaking through Justice Brown) announced intention thenceforth to require the states to show special justification in support of measures restricting the right of employers to contract in their own interest with employees. This was supposedly permitted, even encouraged, by so-called freedom of contract. In this particular case, special justification was found (though not by Justices Brewer and Peckham, dissenting), the mining industry being notoriously hazardous. But the implication of the doctrine asserted was clearly defined seven years later in the Lochner case when the Court, in the absence of any "special" justification for a ten-hour law for bakers, set aside the New York statute on this subject. "There is no reasonable ground," Justice Peckham decided, "for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker."[74] Moreover, Justice Peckham took cognizance of the fact that "this interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase."[75] He feared lest "the legislature in its paternal wisdom" extend regulation of hours of labor to other fields, and he did "not believe in the soundness of the views" which upheld such legislation. Four justices—Day, Harlan, Holmes, and White—dissented. The views of lawyers, such as Choate and Conkling, endorsed by Justices Peckham and Field, as to the "liberty" guaranteed under the Fourteenth Amendment, had triumphed. The Court had now become the guardian of that liberty; and incidentally industrialists, thus allied with the Supreme Court, could frustrate practically all governmental efforts to deal with social and economic problems.

This trend toward judicial aggrandizement is paralleled in rate regulation cases, contradicting the theory of judicial review as plainly stated in 1876 under the liberal guidance of Chief Justice Waite.[76] Speaking for the Court in Munn v. Illinois, the Chief Justice (Justices Field and Strong dissenting) said:

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the term is deemed to embrace the right of the citizen to be free in the enjoyment of his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." P. 589.

[74] Lochner v. N.Y., 198 U.S. 45 (1905), at 57.

[75] *Ibid.*, at 63.

[76] Munn v. Illinois, 94 U.S. 113 (1876).

> It is insisted . . . that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question. . . . The practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation. . . . [77]

Upholding the rates fixed by the state of Illinois in the grain elevator business, the Court declared its purpose to pay deference to legislative findings of fact in determining the reasonableness of such statutes: "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed."[78] And if the particular rates fixed, in a field where rate regulation was held to be permissible, seemed arbitrary and unreasonable, the Court advised that for protection "the people must resort to the polls, not the courts."[79]

These were not snap judgments; they were the result of long and careful deliberation. Concluding his opinion, Chief Justice Waite remarks:

> In passing upon this case we have not been unmindful of the vast importance of the questions involved. This, and cases of a kindred character, were argued before us more than a year ago by most eminent counsel, and in a manner worthy of their well-earned reputations. We have kept the cases long under advisement in order that their decision might be the result of our mature deliberation.[80]

For ten years, the Court showed little or no disposition to qualify the principles on which the Munn case rested. On the contrary, they were reaffirmed and carried forward to their logical conclusion.[81] Justices Field and Strong, of course, continued to dissent, and lawyers, such as Tucker, Judson, Cooley (teacher, judge, publicist, for three generations leading authority on American constitutional law), and Conkling, strongly protested, contending that the doctrine established in the Granger decisions struck at

[77] *Ibid.*, at 133. [78] *Ibid.*, at 132. [79] *Ibid.*, at 134.

[80] *Ibid.*, at 136. The Munn case was also subject to unusual deliberation in the state court, being argued twice. When first considered, it was agreed that the act prescribing maximum rates for the storage of grain was unconstitutional. Soon afterwards, two members of the Court retired and successors were elected. Thereupon a re-argument was ordered so that the case might be submitted to the Court as then constituted. Five of the seven justices upheld the regulation. See J. K. Edsall, "The Granger Cases and the Police Power," 10 *Report of the American Bar Association* (1887), p. 298 *et seq.*

[81] Ruggles v. Ill., 108 U.S. 526, and Railroad Commission Cases, 116 U.S. 307.

the very foundations of our system.[82] Suddenly (in 1890) the Court shifted its position to recognize that this rate-making power of the legislature, even in business "affected with a public interest," was not without limit; that the utility rates allowed must yield a fair return upon the fair valuation of the property devoted to such public service; and that of this the Court, not the legislature, is final arbiter.[83] For the achievement of this specific judicial result, no small amount of credit must go to John W. Cary, a leader of the Chicago bar, one of the best equipped railroad lawyers in the country and, during the greater part of his active career, general counsel for the Chicago, Milwaukee, and St. Paul Railroad. Closely following Cary's brief, Mr. Justice Blatchford said:

> The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States.[84]

Dissenting Justices raised vigorous protest against this revolutionary expansion of judicial power. Said Justice Bradley (with whom Justices Gray and Lamar concurred):

> I cannot agree to the decision of the Court in this case. It practically overrules Munn v. Illinois, 94 U.S. 113, and the several railroad cases that were decided at the same time. The governing principle of those cases was that the regulation and settlement of the affairs of railroads and other public accommodations is a legislative prerogative and not a judicial one . . . This is just where I differ from the majority of the Court. . . . By the decision now made we declare, in effect, that the judiciary, and not the legislature, is the final arbiter in the regulation of fares and freights of railroads and the charges of other public accommodations. It is an assumption of authority on the part of the judiciary which, it seems to me, with all due deference to the judgment of my brethren, it has no right to make.
>
> It is complained that the decisions of the board [of commissioners] are final and without appeal. So are the decisions of the courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tri-

[82] See especially T. M. Cooley, "Limits to State Control of Private Business," *Princeton Review*, March, 1878, and *supra*, notes 15, 27, 41, 72.

[83] Chicago, Milwaukee, and St. Paul R.R. Co. v. Minn., 134 U.S. 418 (1890).

[84] *Ibid.*, p. 458.

bunals. All human institutions are imperfect—courts as well as commissions and legislatures. . . . The important question always is, what is the lawful tribunal for the particular case? . . .

It may be that our legislatures are invested with too much power, open, as they are, to influences so dangerous to the interests of individuals, corporations, and society. But such is the Constitution of our republican form of government; and we are bound to abide by it until it can be corrected in a legitimate way.[85]

Such misgivings as to the wisdom of substituting the judicial for the legislative will in matters of policy, such determination on the part of the minority to be guided by the logic of our representative system (in spite of doubts as to its validity) were of no avail. The Munn case had been virtually overruled.

Nevertheless, as late as 1890 (the Munn precedent having been followed in Ruggles v. Ill., 108 U.S. 526; Railroad Commission Cases, 116 U.S. 307; and People v. Budd, 171 N.Y., 1, 1890), there was well-considered judgment to the effect that a constitutional amendment was needed to put property and property rights beyond legislative control. Arguing in 1890 for such an amendment, Charles C. Marshall observed:

It is perhaps in the natural course of things that the first great question in American political history should have been the question of personal liberty (slavery) and that the second great question is that . . . of private property . . . The property question must be a struggle between classes . . . Years ago the Supreme Court . . . introduced the slavery struggle with the Dred Scott decision. Today it may be that it has introduced the property struggle with the decision of Munn v. Illinois. Each decision leaves a wide section of human rights unprotected by constitutional guarantees. Each is met with a storm of criticism from the advocates of the "higher law." Each is accompanied with dissenting opinions of jurists of highest rank, and lastly each reveals a defect where all was supposed to be perfection and that defect is properly remedial only by constitutional amendment.[86]

Marshall did not question the soundness of the Court's decision in the Munn case. He argued that the doctrine of legislative supremacy is well established, both historically and constitutionally.[87] Such doctrine contravenes certain "higher law" doctrines,

[85] *Ibid.*, at 461, 462, 463, 465, 466. Compare the views of Judge Cooley, *infra*, note 87.

[86] "A New Constitutional Amendment," 24 *American Law Review* (1890), 908 and 930–931.

[87] "The Munn and Budd cases, as decisions of Courts of last resort, are sufficient of themselves within the jurisdiction of those Courts to establish the principle on which they rest. But we have endeavored to show that even without these decisions the principle may be discovered; its operation historically traced; that the

not the Fourteenth Amendment, and therefore the logical remedy was constitutional amendment.

The significant fact is that Marshall believed "the possibility of retracing steps, of reversing or distinguishing, or of otherwise nullifying it [doctrine of the Munn case] through the courts is put quite beyond possibility."[88] But as to this he was mistaken. Marshall had not taken into account the effect of changing judicial personnel on constitutional decisions. When Chicago, Milwaukee, and St. Paul R. R. Co. v. Minn. came before the Court in March, 1890, only three members remained who had participated in the Granger cases of 1876; one of these, Justice Field, had dissented. Of the other two, Miller now hesitatingly concurred in a separate opinion. Justice Bradley dissented, holding that the decision of 1890 practically overruled the Munn precedent, defeating the principle that the regulation of charges in "businesses affected with a public interest" is wholly a legislative, not a judicial, prerogative. The new principle that the reasonableness of railroad and public utility rates is a judicial, not a legislative, question, was boldly stated by Justice Harlan for a unanimous Court in Smyth v. Ames:

> The idea that any legislature, state or federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation.[89]

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constitutional prohibitions against depriving a citizen of his rights without due process of law and against the taking of private property without compensation cannot be conclusively urged against it; and that the theory that in the absence of constitutional prohibitions the principle is repugnant to the spirit of our institutions or our form of government, is contrary to almost the entire weight of judicial authority and legal opinion. One may urge all these considerations and yet be conscientiously aware of how much may be said on the other side." *Ibid.*, pp. 928–929. For the other side, see T. M. Cooley, *op. cit.* (*supra*, note 82). Yet even Judge Cooley concedes that "the doctrine that the representative [legislative] was subject to any other than a political responsibility, or that legislative acts might be questioned elsewhere, did not readily take root in American soil. It was the judges, not the legislature, who first became subject to popular mistrust . . . " P. 234.

[88] *Ibid.*, p. 909. "Mr. Justice Field and Judge Peckham [then on the New York Court of Appeals] are jurists of such eminence that their opinions have been as carefully read and will perhaps be regarded with as much attention in the future as the opinions of their respective Courts; but the view is submitted with all deference that before their opinions can be carried out an amendment to the Federal and State Constitutions is now necessary." P. 930.

[89] 169 U.S. 466 (1898), at 725–728.

Thus in the most important fields of modern legislation—the power of Congress to tax and regulate interstate commerce, the state police powers, etc.—the Court had appointed itself final judge of state and federal policy. To accomplish this, it had practically to rewrite, or amend, some of the most important clauses of the Constitution. Writing in 1910, Justice Harlan said:

> After many years of public service at the National Capitol, and after a close observation of the conduct of public affairs, I am impelled to say that there is abroad, in our land, a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction . . . To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most disastrous to all.[90]

The Court read Spencer's doctrine of *laissez-faire* into our fundamental law, and on the basis of this economic theory decided against legislation not specifically forbidden by the written Constitution. Incidentally, the *laissez-faire* dogma is relatively a newcomer in our judicial-political cosmology. It had no advocates (save perhaps clergymen) of any consequence prior to about 1870. Before then, our government, federal and state, had freely aided private enterprise in the development of material resources and in other ways.[91] Furthermore, this dogma, in fact, was in itself contradictory. As Bryce remarked in 1888: "One-half of the capitalists are occupied in preaching *laissez-faire* as regards railroad control, the other half in resisting it in railroad rate matters, in order to have their goods carried more cheaply, and in tariff matters, in order to protect industries threatened with foreign competition. Yet they manage to hold well together."[92] When in the last quarter of the nineteenth century, government began to regulate public utilities and big business, lawyers and judges invoked this confused doctrine of *laissez-faire* and passed it off as individualism, as synonymous with the liberty which is guaranteed by our federal and state constitutions—in short, they built *laissez-faire* into the structure of the Constitution itself. With popular sovereignty and democracy undermined, the Court became a sort of living god enshrined in an unimpeachable constitutional theology

Judicial power so enlarged involved great responsibility. With

[90] 221 U.S. 1, 105.
[91] See T. M. Cooley, *op. cit.* (*supra*, note 82), p. 236 ff.
[92] *American Commonwealth* (1921 ed.), Vol. 2, p. 304.

"few scientifically certain criteria of legislation," it was hard to mark the line where the power of government is limited by the Constitution. What safeguarding measures should be taken after the judges had thus read into the Constitution "*a nolumus mutare* as against the law-making power?"[93]

Louis D. Brandeis answered this challenge in 1908 when he introduced his epoch-making factual brief to the attention of the Supreme Court. Certain commentators saw in the Court's approval of Brandeis' technique evidence of increased liberalism. A period of judicial self-abnegation was heralded. The results, however, do not justify such optimism, especially during the last decade under the conservative leadership of Mr. Justice Sutherland. Though social data be furnished by enlightened counsel, there is still no assurance that the Court will find these either acceptable or important, or even interesting.[94] In the Muller case,[95] where this new technique was introduced, the influence of facts *per se* has probably been over-emphasized. It is true that Mr. Brandeis' brief won favorable comment in Mr. Justice Brewer's opinion, but one finds language elsewhere therein to justify the conclusion that an eight-hour law for women would have been sustained even without support from scientific data.[96] The point is that when facts, however stubborn, are confronted by "stubborn theory," the latter usually wins. When dogmas and doctrines control judges' thought, an impassible barrier is set up against the entrance of fact into the judicial mind. "Facts," as Professor Morris R. Cohen has well said, "are more pliable than stubborn theories. Facts can be ignored, explained away, or denied. But theories are mental habits which cannot be changed at will."[97]

[93] Justice Holmes in Noble State Bank v. Haskell, 219 U.S. 104 (1915), at 110.

[94] For a full discussion of the Brandeis brief in Supreme Court cases, see my volume *Brandeis and the Modern State* (1936), Chap. 6.

[95] 208 U.S. 412 (1908).

[96] "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. . . . History discloses the fact that woman has always been dependent on man. . . . Some legislation to protect her seems necessary to secure a real equality of right. . . . It is impossible to close one's eyes to the fact that she still looks to her brother and depends on him. . . . A widespread and long-continued belief concerning [a fact] is worthy of consideration. We take judicial cognizance of all matters of general knowledge." 208 U.S. 412, 241–2 (1908). This apparently means that the decision was based on "common knowledge" rather than on the knowledge gained from Mr. Brandeis' brief.

[97] "The Process of Judicial Legislation," 48 *Amer. Law Rev.* 161 (1914), p. 164.

There are obviously distinct limits to the effectiveness of facts in Supreme Court decisions. Direct contact with reality is often lost because of prior concepts, principles, systems, and postulates. "The scrutiny and dissection of social facts may," as Mr. Justice Cardozo has pointed out, "supply the data upon which the creative spirit broods, but in the process of creation something is given out in excess of what is taken in."[98] This explains why the discretionary veto which the Court now enjoys over state legislation in due process cases may be exercised mildly, and at other times rigidly. Whether it be applied loosely or strictly depends not so much upon facts brought to the attention of the Court, nor upon any statable rule, but rather upon what social-political theology is held by a majority of the justices.

If one may judge from more recent cases (1922–36), use of such material has only given the Court one more weapon with which to strike down theoretically offensive legislation. Besides those granite concepts of liberty and property on which pioneer social legislation, like the minimum wage and the ten-hour law for bakers, went to wreck, the Court can now fortify itself with statistical data to show that a particular exercise of police power is arbitrary and unreasonable, and therefore violative of "due process."

How may one account for this extraordinary transformation of the judiciary from a court of law to a super-legislature? We have seen one constitutional formula after another—commerce, due process, congressional taxing power—emptied of its earlier meaning in order to give force and effect to some later economic version of Spencerian *laissez-faire*. To say that the Constitution was judicially amended, as to certain of its most important provisions, is merely to paraphrase the language of dissenting judges. No doubt the gradual abandonment of the *laissez-faire* doctrine by the country at large accounts in some measure for this bold formulation by the judiciary of a new-old Constitution. J. S. Norton, a lawyer, indicated in 1890 the reasons for such action, and his words are as representative of contemporary lawyer psychology as they are prophetic:

> At present this newly awakened solicitude for the public weal seems likely to carry us beyond the bounds of temperate action; but it cannot be that we as a people shall long ignore the folly of discouraging capital by

[98] *The Growth of the Law* (1924), p. 90.

petty restrictions and unjust discriminations. We shall soon cease to regard corporations as natural foes of good government.[99]

The rise of populism, the emergence of trade unionism, Theodore Roosevelt's "New Nationalism," increasing governmental interference with business and working conditions—all such developments may well have prompted judicial preëminence. At any rate, in the course of this struggle to remold our law and politics to a more truly serviceable industrialism, alarmed conservatives invoked the aid of the Court, and not in vain. Commenting in 1916, Mr. Louis D. Brandeis observed:

> Political as well as economic and social science noted these revolutionary changes. But legal science—the unwritten or judge-made law as distinguished from legislation—was largely deaf and blind to them. Courts continued to ignore newly arisen social needs. They applied complacently eighteenth-century conceptions of the liberty of the individual and of the sacredness of private property. Early nineteenth-century scientific half-truths, like "the survival of the fittest," which translated into practice means "the devil take the hindmost," were erected by judicial sanction into moral law. Where statutes giving expression to the new social spirit were clearly constitutional, judges, imbued with the relentless spirit of individualism, often construed them away.[100]

The words of Frederick N. Judson, echoing the views of lawyers and judges, support Brandeis' contention:

> . . . however much this theory of the origin of government [social compact] may be discredited historically, it remains, as has been said, a convenient fiction for the embodiment of a fundamental political truth, and to this extent it retains as firm a hold upon the public thought of today as upon that of the last century.[101]

The Court, increasingly "packed" after 1885[102] with exponents of eighteenth-century individualism, and faithfully performing what it conceived to be its historical function of protecting "the individual" against "arbitrary action" of government, ignored the Constitution of 1789 and evolved decisions so novel and far-reaching as those in the Pollock, E. C. Knight, Debs, Lochner, and other cases.

These brand new restrictions set by the Court were thenceforth fortified against progressive legislative power. Not only was judi-

[99] "The Rights of Citizens," *Scribner's Magazine*, Sept., 1890.

[100] "The Living Law," 10 *Ill. Law Rev.*, 461 (1916), p. 466.

[101] *Op. cit.* (*supra*, note 15), p. 234.

[102] Cf. J. T. Morgan, "Partisanship in the Supreme Court," *North Amer. Rev.*, Feb., 1881, p. 180 ff.

cial review expanded, especially under the due process clauses, but the "rights" of life, liberty, and property, protected by those clauses, were given broader and newer meanings. The common law had treated property as a physical thing held for the owner's use—a narrow view from which the Court departed under Chief Justice Fuller. In the Minnesota Rate Cases,[103] it was held that anticipated earnings of revenue are property. In the labor injunction cases, business as a "going concern," and the right to do business, were both included under the term property; while in the Pollock case all the uses which give value to property were treated by the Court as inseparable and indistinguishable from property itself.[104] The Court thus accepted, perhaps unwittingly, certain doctrines of "value" and "property" currently identified with the accounting practices of unscrupulous corporate promoters and speculators.

During the same period, liberty came to mean much more than the mere absence of physical restraint. It was extended to include the individual's right "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation.[105] And the "person" whose life, liberty, and property is protected against governmental encroachment was construed as meaning more than *homo sapiens;* the modern business corporation is also a "person" entitled to the same solicitous protection as that once accorded the individual human entity. New-old definitions of "liberty" and "property" of this anarchic sort, as coined by the Court in the 'nineties, were thus the means, rather than the cause, of the judiciary becoming substantially a perpetual and persistent censor of both state and federal legislation.

This whole period was one fraught with dynamic possibilities of both progress and disaster, charged with a new restlessness by the closing frontier, necessitating new forms of internal develop-

[103] 134 U.S. 418 (1890).

[104] The judicial enlargement of the word "property" reached an extreme point in the International News Service v. Associated Press, 248 U.S. 215 (1918), where Justice Brandeis delivered a strong dissenting opinion. Mr. Justice Stone states his reaction to his development thus: "Beyond the traditional boundaries of the common law, only some imperative justification in policy will lead the courts to recognize in old values new property rights." Reichelderfer v. Quinn. 287 U.S. 315, 319 (1932).

[105] Justice Peckham in Algeyer v. Louisiana, 165 U.S. 578 (1897), at 589.

ment and of external expansion. Under the philosophy of *laissez-faire*, but with the aid of government, federal and state, great railroads were flung across the continent, business organizations took form under easy incorporation and other fostering laws of briskly competing states. An era of intense industrial development set in, of unbounded opportunities for the luxuriant and greedy individualism of promoters on whom the law conferred rights without duties.

No longer able to develop and exploit natural resources at will, the erstwhile pioneer began to oppress and exploit consumers, competitors, investors, and employees. For the first time in our history, the great masses, rather than the privileged few, sought after about 1870 to use government as an instrument for protecting and advancing their own economic rights under imperiling conditions. Democracy had, by wide extension of the suffrage, been formally established since at least 1850, yet until the last quarter of the nineteenth century the possessing classes still continued to rule and possess without serious menace to their growing political and economic dominance. So far, democracy had been, generally speaking, innocuous because it was itself "on the make." Furthermore, in the expanding United States, there were no accepted economic-social classes. But as soon as popular sovereignty began to assert itself against the new economic "kings," *laissez-faire* economic and political theory, interpreted as being the Constitution, was used to put very definite restrictions on any interference of government with the "free enterprise" and property rights of the new magnates. Charles C. Marshall, a lawyer, explains but does not justify this judicial improvisation:

> Dumb for almost a century on the questions involved [in the relation of government to industrialism] because no inquirer had sought the shrine, they [judges, such as Waite] now give forth a response which startles lawyers and laymen and startles them the more they read and examine. For the first time it is appreciated that there has lain dormant for a century a vigorous principle of the common law, an element of Anglo-Saxon government, which in the hands of an aristocracy has often been an instrument of wrong and oppression and which may in the hands of "the people" effect a despoliation of property-owners surpassing the encroachments of the crown at the worst periods of English history.[106]

In answer to current popular demand and agitation, a considerable amount of state legislation was enacted and sustained. Sound judicial leadership under Chief Justice Waite promised to

[106] *Op. cit.* (*supra*, note 86), p. 930.

keep review of legislation within such bounds as would save the Court from becoming involved in matters of policy and politics. This hope was short-lived. By 1890, sturdy individualists of the new monarchism, such as Fuller, Peckham, Brewer, and Field, dominated the Court, and the scope of judicial review was expanded by them so as to delay or prevent American legislatures from dealing with pressing social problems in a manner long approved and practiced by the advanced industrial nations, and demanded by our own altered economic situation. These judges apparently did not realize, as did Justice Holmes, "how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind."[107]

Until the argument therein be refuted, the foregoing pages make mere rhetoric of the Court's traditional view of its function in our constitutional system. "Liberty," "due process," "property," "commerce," etc., are, to put it mildly, obviously susceptible of flexibility. With no constitutional authority other than that of interpretation, the Court fixes economic and social relationships as it likes. How far may government go in the exercise of police and taxing power for the promotion of general welfare? What is there in the "due process" clauses of the Constitution that defines the scope of legitimate action by employer and employee, each of whom seeks to advance his own social and economic interests? What is there in the phrase "due process" that hints whether five, six, or eight per cent is a fair return on public utility property? What is there that sheds light on whether utilities should be valued for rate-making purposes at original cost, book value, or at reproduction cost new? Such questions are not primarily legal; rather they are economic and social in nature. Since they are not, and cannot be, answered in the Constitution, much more is involved in reaching a decision on nationally contested political issues than merely laying "the article of the Constitution which is invoked beside the statute which is challenged to decide whether the latter squares with the former."[108] The constitutionality of legislation depends, as we have seen, upon the economic theory entertained by judges who happen to constitute a majority of the Court.

There might have been public advantage (after theory had been substituted for the constitution as the basis of decision) in having the judges frankly recognize their duty to weigh considerations of

[107] O. W. Holmes, "The Path of the Law" (1897), in *Collected Legal Papers*, p. 181.
[108] Language of Mr. Justice Roberts in U.S. v. Butler, 297 U.S. 477 (1936), at 486.

social benefit. By thus making the ground and foundation of judgments articulate and known, these could have been debated on their merits rather than disguised as somehow related to provisions of the Constitution. This position was taken in 1897 by Mr. Justice Holmes. Said he:

> When socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England. . . . I think that something similar has led people who no longer hope to control the legislatures to look to the courts as expounders of the Constitutions, and that in some courts new principles have been discovered outside the bodies of those instruments, which may be generalized into acceptance of the economic doctrines that prevailed about fifty years ago, and a wholesale prohibition of what a tribunal of lawyers does not think about right. I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.[109]

The truth is that the Court (especially since 1890) has been at the very center of our bitterest political controversies. Of its own volition, it migrated from the quiet serenity supposed to surround the judicial process to the rough and tumble arena of political strife, thus inevitably risking both destruction of judicial temperament and distortion of the Constitution. Holmes did not reveal any Court secret in 1913 when he remarked: "We are very quiet there [in the Supreme Court], but it is the quiet of a storm center, as we all know."[110]

Such was the environment of Sutherland's formal education and practical experience as he began in Salt Lake City, Utah, in 1883, his career as a lawyer and legislator. Such was the conflictingly intricate pattern of ideas, concepts, and forces within which he labored later on the floor of the Senate, on the public platform, and in the Supreme Court. It was during this period that Sutherland fixed his ideas of democracy and its dangers, of progress and how to achieve it, of "liberty" and its scope under the Constitution. He then became impressed by the great responsibility resting upon the judiciary (especially the Supreme Court) to preserve his peculiarly Burkeian concept of representative government without which there can be neither "freedom" nor progress; and above all to uphold "liberty" and "property" as thenceforth guaranteed by the Constitution newly amended in 1883–1910.

[109] O. W. Holmes, *op. cit.*, p. 184.
[110] *Ibid.*, p. 292.

WHAT IS THE TROUBLE WITH INTERNATIONAL LAW?

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According to the textbooks of publicists, and according to the formal rules of international law, Ethiopia possessed certain well defined rights, and as a state was legally equal to all other states. Her position in the world, legally considered, was secure, buttressed as it was by a formidable array of rights such as "existence" and "self-defense." Yet when it came to discussing the fate of Ethiopia, students of international affairs did not run to their law books, but focussed their attention upon happenings in Rome, Paris, London, and possibly Geneva. China, too, is a state, endowed with a legal right to exist on equal terms in what is euphemistically called the "family of nations." But Far Eastern events are determined and shaped but little by legal rules; rather it is the policies of Japan and the other Great Powers which actually condition the flow of events and govern the future of China. Situations such as these are by no means exceptional, and lead many to the conclusion that they make for "a world without an effective system of public international law, in which force is the determining factor between nations [and in which] only Great Powers, by reason of their disproportionate strength, can invest their national policies with real international importance."[1]

The point that international law does not seem to be a factor of great consequence in the sphere of international affairs is not offered as anything new. For years, so-called realists in international relations have virtually ignored the law's existence, have minimized its importance, and have tended to subscribe to the irreverent view expressed by one writer that there are only three rules of international law: first, nations *ordinarily* should stay on their own territory; second, ambassadors *should not* be "beaten up;" and third, treaties *should* be observed most of the time. International lawyers, in their turn, have somewhat smugly asserted that such critics, being but neophytes in the science of the law, are too much taken with mere policy as distinct from law, and declare that the fundamental rules of state behavior are legal in character. It is here pro-

[1] F. H. Simonds and B. Emeny, *The Great Powers in World Politics*, p. 28.

posed to examine the validity of the arguments on each side and, specifically, to seek an appraisal of the position of international law in the international political arena.

If international law is to avoid becoming a sterile study, it seems obvious that international lawyers must pay more heed to the realist critics who call attention to the dynamic factors that lie outside the law. Problems of nationalism, of imperialism, of strategy in regard to raw materials, of the balance of power, of security —all of which are of prime concern in shaping the destinies of nations—remain, for the most part, outside the legal range; and though in theory the law provides the framework within which events of international importance take place, in practice those happenings can and may be studied independently of legal considerations. International law may be a neat little science within itself, but if it fails to be of service in guiding the policies of states in matters of grave moment, the international lawyer cannot but be alarmed for his study. Too often in the past he has assumed the attitude that the world is out of step with his law, and too seldom has he considered the point that perhaps his science is partly to blame.

Years ago, Professor Brierly, in his article, "The Shortcomings of International Law,"[2] suggested that instead of finding fault with states for not following the law, it might be more profitable to examine the law and see why states are not more inclined to trust to legal formulæ for the governing of their relations. Following to some extent the lines laid down by Professor Brierly, it is here put forward that the law must become truly positive once more, that is, it must be based less upon orthodox positivism, which in the last hundred years has drawn the law away from its ideal of being based upon actual practice and has led it into the wilderness of sovereignty, and more upon the current and actual behavior of nations. In other words, the law must to a greater degree recognize politics and policies. Specific mention of matters such as the Monroe Doctrine which might profitably be reconsidered from this neo-positivist view will be made after a discussion of some preliminary topics concerning the development and nature of international law as it is at present.

Undoubtedly, international law has been subject to an undue amount of criticism, in part for reasons unrelated to its intrinsic

[2] *British Yearbook of International Law* (1924).

merits and defects. Because it deals with the relations of states whose "game" is played upon a large and dramatic scale, it has been thrust into a position not occupied by other branches of jurisprudence which ordinarily affect a narrower and less sensational play of forces. The defects of the international legal system have thus been given a disproportionate amount of attention and scrutiny, while the fundamental nature of international law has been the subject of infinite controversy and discussion. A war of words has raged as to whether it is true law or not, the broadsides of Austin and his followers having been particularly devastating. Hence, international lawyers have spent much of their energy in defending the legal nature of their subject, a job which municipal lawyers for the most part have been spared. And then further, international law has suffered at the hands of some of its over-zealous friends who have claimed too much for it. Supporters of the proposition that it either regulates or can regulate every dispute between nations only over-state the case and set up the law as an easy target for its foes. The impression gained all too frequently from standard texts to the effect that the world of states is a tidy one, regulated by precise rules, is false, and one, unfortunately, which in time often makes for disillusionment and cynicism.

The reasons for much of the dissatisfaction with the place of international law in international relations therefore lie in the concepts of the law itself as well as in the actions of the states. Many of the critics of the traditional positivist stand, however, seem, in their turn, to be following a wrong course. These latter, among them Professor Lauterpacht, in their reaction against the time-honored tenets of positivism, deplore the inadequacy of that doctrine with its admission of gaps in the law and go on to affirm that there are no necessary breaches in the international legal edifice, and that the law can be made to cover all disputes, every controversy being justiciable, as the term goes.[3] The difficulty with the positivists, however, rests not in the assumption that there are apertures in the structure of law, but in the fact that the positivists are no longer truly positive. The notions of sovereignty, of equality, and of consent as the basis of the binding force of the law do not square with the realities of the international situation, and the remedy lies, not in enthusiastically claiming that the law covers

[3] *The Function of Law in the International Community, passim.*

everything, that it is complete when it is not, but in bringing the law more into line with the facts.

According to the traditional view, and also according to any correct analysis of the world situation, international law does not deal adequately with more than a part of the field of international relations, and, what is more, does not seem capable of doing so except in a very negative fashion, given the lack of any real community of interest among states on many questions such as revision of frontiers, expansion, raw materials, and resources. The law itself admits the gaps in its framework in its recognition of domestic questions, or non-justiciable disputes (denied by the neo-naturalists like Lauterpacht), and above all, in its allowance for the use of force and wars. By permitting the latter, the law admits the weakness of its own positive system of rights and duties; for, by condoning measures of force short of war, and war itself, the law merely rationalizes the results of its own limitations. So many of the crucial and irritating questions of interstate relations, such as immigration, tariffs, naval and military maneuvers, creation of armies and navies, are domestic questions that these great sources of international friction come but nominally (and ineffectively) under the control of law.

There is not as much law governing international relations as persons like Lauterpacht and his neo-naturalists declare, but assuredly there are some actual rules, customs, and practices regulating the conduct of nations which the law must recognize to an extent far greater than the positivists allow, and which cannot be summarily classed as merely political, if the law is to achieve any effective measure of standing and dignity. This is not to say that law is co-extensive with politics, or that all national policies are to have a mantle of legal legitimacy thrown about them, but it does mean that where political practice has crystallized into pretty well understood rules, the law is only weakened by blinking the facts. It may well be asserted that positivist international law *is* based upon practice crystallized into rules, and so it is in theory. But the fact seems to be that the positivists—and this includes the majority of international lawyers—are these days deviating far from their own first principles, particularly in enumerating a list of rights which supposedly states possess but actually do not, and in shutting their eyes to the practice which has developed in connection with the Great Powers.

The currently accepted international law is essentially a *status quo* law which grants to allegedly equal entities known as states certain substantive rights usually listed as the rights to existence, to independence, to equality, to jurisdiction, to property, and to intercourse. These are usually laid down in absolute terms, and it all makes a very orderly structure. At the same time that it supplies these substantive rights, the law sets up certain rules as to forms and procedures relating to treaties, diplomacy, and force, by which all these allegedly fundamental rights may be changed or destroyed. This dualism leads to some strange paradoxes: the right to existence, so elaborately and dogmatically set forth on the one hand, may be totally annihilated by the use of force provided for on the other hand, and the treaty of peace will be perfectly valid! The Great Powers move in a realm of strategy and higher interest all their own, frequently not hesitating to violate the so-called basic rights of smaller nations, but following the forms of diplomacy, treaties, and force allowed by the law. In the case of Ethiopia, for example, Italy, Great Britain, and France before 1935 made small fuss over that state's rights to exist and to territorial inviolability, but they conformed to legal etiquette in negotiation and in the application of pressure, political and military.

It is this fact that the Great Powers operate in a sphere of their own that renders nugatory and holds up to ridicule the usual positivist claim that all states are legally equal, each with its own block of absolute rights. The legal situation cannot be prettily tied up in pink ribbons. It may be contended that the Great Powers, when they violate the rights of smaller states, are merely outlaws and law-breakers, but when this practice of outlawry continues and remains unchecked, the law of formal and substantive rights becomes something for the textbooks only. Perhaps there is a separate law, a "higher law," to speak in terms of potency, not ethics, for the larger states; it is recognized that there is such a thing as a law among outlaws, and if the community *mores* are profoundly affected by the habits and usages of the "bad" members, a reconsideration of what the actual laws of the community are seems in order. Present-day international law is in the somewhat ludicrous position of giving rights which are ever so solemn at one moment, and at the next giving its blessing to their destruction.

Instead of insisting as the positivists do upon the rights of *all*

states, and upon stating them in such categorical terms that absolute right is bound to meet absolute right, e.g., the right of state A to exist *vs.* the right of state B to intervene to "protect" its citizens, would it not be preferable to qualify the rights of states in accordance with international realities, and to recognize that certain powers follow policies, generally accepted, e.g., the Monroe Doctrine, which modify greatly the absolute rights of other nations? In this fashion, law and practice would be brought more into accord, the law would be set free from an artificial, meaningless, and barren association with an abstract and metaphysical doctrine of absolutes, would cover a wider field of international relations by giving recognition to the *actual* relations of states, particularly to the status of the more important states, and yet would avoid tumbling into the false position of those who in their anxiety to plug up the positivist holes assert that the law covers all. Greater flexibility than the positivist allows, less stretching than the neo-naturalist seeks, is the need if the law is to escape two untenable and unreal doctrines. That this proposition is vague, that it runs into the danger of calling "law" only that which those with force at their command, i.e., the Great Powers, care to consider as law, that it weakens the position of the minor states, and that it undermines the law and inserts power politics instead, are objections which will be discussed at a later point.

The suggestion that international law today should place more emphasis upon current practice involves an analysis of the two great schools of thought, the naturalist and the positivist, under which international law has grown up. As is well known, the foundations of the system were laid under the influence of the naturalists, who, lacking much practice to guide them when the arrangement of world society into states was so new, emphasized natural law, the use of reason, and *what ought to be* as the basis for international conduct. The content of natural law did not seem too difficult to supply because Roman law was at hand to furnish the material. As the years went by, however, an accumulation of custom and usage became available as the basis for law, and reacting against the naturalists whom they held to be too metaphysical, the positivists came to the fore, proclaiming that the law as they saw it and interpreted it was, and must be, posited on actual practice. The war between the naturalists and the positivists, however,

was and is today in large measure a sham one; for, despite theoretical differences, the two tended to approach one another. Let us look into the reasons for this.

Natural law is susceptible of many interpretations and meanings, and can be used in a variety of ways. For example, natural law can be (1) an ideal law, i.e., an eternal principle of right imposed on men and nations for all time. It was sometimes interpreted in this fashion by certain writers who thus became easy marks for the later "practical" positivists who endeavored to bring the law down from the ethereal to the facts. But also natural law can be understood (2) as those rules which seem reasonable. Where men in different communities are found to be acting under similar rules, those rules "must" be reasonable or natural, common to all mankind, and hence *jus gentium*. In this fashion, natural law is virtually based upon practice, and differs but little, except in theory, from positivism. And (3), natural law, instead of serving as a universal command, demanding the obedience of all states and peoples and thus making for order and universal acquiescence, may be construed so as to make for an absence of restraint. If natural law is what is reasonable, a dictate of right reason, may not individuals and states differ in their interpretation of what constitutes "right" reason? The Church, after incorporating the notions of natural law into its doctrine under the guise of the law of God, discovered that such a procedure was not without grave danger to its own existence when men and women began to interpret the law of God in their own way. Natural law, therefore, was employed with different connotations by different authors and expounders, and, depending upon the interpretation, led to metaphysics, to something closely akin to positivism, or to anarchy. The chief importance of natural law for international law lay not so much in its providing an ideal alternative to anarchic and crass practice as in its implication that there existed *some* first principles at the back of and before practice, and in its natural emphasis upon the deductive method as a basis for the fixing of rights and standards.

The positivists, led in the earlier years by writers like Zouche, and toward the end of the eighteenth century by Moser and De-Martens, challenged the assumptions of the naturalists, holding up the *practice* of nations as the proper guide for determining what the law really is. This insistence upon current custom as the source of law, while theoretically at the opposite pole from naturalistic

philosophy, led to results not intrinsically very far removed from that doctrine; for, as above indicated, what men find to be reasonable and the rules men formulate and obey are not necessarily divergent. Further, as has been frequently pointed out, the use of reason is not barred by positivist thinking; the terms "reasonable man" and "reasonable risk" are familiar enough in the common law, and the concept of equity is closely akin to natural law philosophy. Despite their antipathy to what they regarded as too abstract and too unreal in the naturalist school, the positivists in their turn became metaphysicians. The doctrine of sovereignty, developed by them, and originally related to the actual international situation, has gathered momentum of its own and has carried the law aloft into clouds of hair-splitting and befuddling speculation, with the result that so-called positivists speak in terms of absolute rights of states, deducible from the idea of sovereignty. The amusing scene is thereby presented in which alleged positivists, having established an artificial system of sixty-five states each of which has a bundle of fixed rights neatly in its possession, talk like dogmatic philosophers, while neo-naturalists challenge the positivists for being no longer truly positive. Small wonder that international legal philosophy is in confusion! Also, just as natural law tended to tempt individuals and states to deduce right reason for themselves and so to weaken the force of external, compulsory law, the positivist, by his insistence upon sovereignty and sovereign rights, has undermined the sense of any binding regulations, paradoxically, by his theory of law opening the way for the negation of law.

The positivist-naturalist conflict has thus been waged for the most part upon false premises, the real differences between the two being mainly a matter of emphasis. Positivism uses reason as the naturalist does. It employs absolutes. As Pollock has said, "custom is rational." The naturalist could not ignore practice, nor could the positivist omit some first principles. For example, both positivist and naturalist, each in his own way, too often came to the conclusion that all states are legally equal, a conclusion challenged by the present facts of international experience and by the sound thesis of Professor Dickinson that equality refers not to capacity for rights but to a position before the law.[4]

No matter how hard he has tried, the positivist has been unable to escape positing his science on some principle as well as practice.

[4] *The Equality of States in International Law, passim.*

By his doctrine, law becomes binding upon a state once the latter has consented to that rule. So much may be in accord with practice, but why, once consent has been given, *must* a state abide by that law, and why may it not retract its consent? From whence did the positivist glean that significant and crucial item? Why *pacta sunt servanda?* Post-war students of international affairs might well be chary about taking practice as a guide on that score. From somewhere, though he does not like to admit that that somewhere is labelled "natural law," the positivist must draw some principles smacking very much of the *a priori*. Law cannot be based absolutely on mere practice alone; there must be some first principles—some of what John Fischer Williams calls "original law," some fundamental norms of right conduct appealing to the mentality of mankind—to which to attach custom and practice. Neither positivist nor naturalist can or should avoid these underlying "oughts."

The point at issue here is to indicate that the cleavage between positivism and naturalism is more apparent than real, and that each has gone astray in regard to his first principles. The metaphysics of the positivist in regard to sovereign rights and equality is as absurd as that of the naturalist ever was. The former has been derelict in not admitting that *all* is not practice and that he has had to reach into the naturalist store-house for some basic conceptions. Realistic international law today must admit of some "original law," e.g., *pacta sunt servanda* (with qualifications), but the positivist superstructure of sovereign and unqualified rights, reared upon no truly valid first principle and unrelated to fact, contains so much rubbish that its early destruction is to be devoutly hoped for. This does not signify, however, that with the toppling of sovereignty, it should be concluded, with the neo-naturalist, that somehow the law has stepped into the void and filled all the gaping holes which the sovereignty doctrine has helped to perpetuate.

The term "sovereignty" is the bane of political theory and international law. Applied originally to some person or group within the state, it became fastened upon the state itself, and for international law purposes, was made the necessary ingredient in statehood. No political entity could be a state unless it was sovereign, i.e., unless it possessed complete political freedom, or rather, unless there existed no higher political authority above it. The theory of sovereignty, when first grafted on to international jurisprudence,

reflected an objective condition of fact at a time (about the end of the eighteenth century) when the independence of nations was being stressed and when the bonds of law were relatively few and tenuous. If sovereignty meant supreme political power, how was an entity, possessing such power, to be conceived of as in any way bound by law? The positivist met this dilemma most ingeniously by the device of consent, which in theory bridged the chasm between freedom and legal restraint by maintaining that a state, in the exercise of its sovereignty, "consented" to be bound by a legal rule, and once having consented, that consent could not be withdrawn. Why not? From whence but "original," or natural, law did the positivist derive that needed and saving device? Once in the law, the mighty sovereign, still "free" and endowed with supreme power, could not extricate himself. Consent was irrevocable. No other system of law has been based upon premises such as these which derive the binding nature of the rules from the consent of the subjects of the law alone, and which thus place the law upon a strangely artificial and fragile basis. The dubious character of such an arrangement is apparent in several ways. When new states are admitted into the circle of states, they are bound by international law, though they never furnish any formal signs of accepting it. The positivist says that in being admitted, they thereby "consent." To such weird fictions must the positivist resort in order to bolster his system. Furthermore, the stress upon sovereignty and all that that undesirable word connotes in the way of freedom of action, power, and irresponsibility has been almost disastrous from the point of view of building up a sense of obedience to law. In fact, the use of the term is almost the negation of law, emphasizing as it does the power of the subject rather than the force of the rules supposedly restraining the subject. If sovereignty is to be admitted into the legal edifice at all, it would seem more logical to follow the lead of the "auto-limitationists" like Jellinek, who simply asserted that sovereign states were bound to the law *only* when they wanted to be so bound and that obedience was purely voluntary.

It is not denied that there is a large area in which governments may and do act as they please, unhampered by legal restrictions; but to call the state, for which the government is supposed to be the agent, *sovereign* is most unfortunate. From the legal point of view, it is meaningless to have the subjects of the law called "sovereign"—it is a contradiction in terms—and from a more general

viewpoint, it is confusing to talk of sovereign states bound to law, because sovereignty cannot readily be disassociated from its historic implications of power and unmeasured freedom of action. Instead of that misleading word, it is suggested that it would be better to talk in terms of authority, a less resounding word, to be sure, but far better adapted to legal thinking. According to traditional international-law ways of reasoning, domestic or municipal law is made by and is under the domination of the "sovereign" state, which turns about and "consents" to be bound by international law. The latter is hence construed to be something intrinsically different from municipal rules and separated from them by the mystic charm of sovereignty. Such a division between the types of law is both unreal and harmful. As the historical jurists have pointed out, and as some writers like Krabbe[5] and the monists of the Vienna school, among others, have stated, all law, international and municipal, is generically the same, and rests upon the same sort of foundations. Would it not be more logical and more in correspondence with the facts to think in terms of a chain of authorities, linking the local through the national to the international, each authority having a measure of freedom in its sphere? To avoid vain arguments over priority, this chain should be visualized horizontally rather than vertically. Certainly the national authority in most cases has a preponderant influence in law-making. But is the law restricting and restraining it in its dealings with other national governments, whether that law has come into being "unconsciously" by custom and usage or more formally by treaty and agreement, of a vitally different character? Is it not just as binding, just as legal, as the law governing local bodies? So much of international law is still "universal custom" to which no specific consent has ever been given, so much has just appeared, that sovereign consent is not needed to make it legally binding. The process of *new* law-making, internationally, does at times require the more formal consent of governments. That is but international law's familiar and crude method of "legislation," the resultant law being similar in *kind* to that of a domestic Congress. Sovereignty and consent are not required to explain the obligatory force of international rules.

The historical school is useful on this score to point out that all law at first merely grows, is formed not by conscious direction but

[5] *The Modern Idea of the State*, Chap. 4.

by habit, and then later on is placed upon a more rational basis as men consciously plan and make rules for their affairs and interests. It is virtually impossible to define law arbitrarily, but practically it consists of those rules which the bulk of the subjects regard as legally binding, whatever the source of that binding quality, whether it is because the rule is enforced by a superior, because it has an ethical content, or because it is derived from a law of nature or from a collective will. Domestically, law is what most of the people obey and feel that they should obey. Courts and legislatures help to formulate, preserve, and present the rules, but law is mass custom in the long run. The people are both *under* and *over* the law: they obey it and they create it. Similarly, internationally, a body of rules has grown up which heads of states feel that they should obey, whether out of conscience or because the law appears to represent long-run general interest, or both. Law supposedly is in the general interest, and when obeyed consciously—most obedience is due probably to inertia—is followed for that reason. Many of the so-called rights and regulations of international law cut athwart what certain powers conceive to be their interest, and if it is disobeyed long enough and if new customs arise in their place old law is gone and new has appeared. The international legislative process is halting and awkward, but that is no excuse for resorting to sovereignty and consent and to placing international law upon a basis different from all other types. International law is binding for the same reasons that other law is binding, and the international lawyer should not have to explain the sources or the obligatory effect of his rules any more than does the municipal lawyer. Those, as Professor Brierly has aptly stated,[6] are problems for political theory and psychology. By placing his law upon the consent or order of a determinate sovereign, though a many-headed one, the positivist is really being Austinian and is actually supporting a notion of law which is notoriously unsound. Law is more than a system of orders or commands resting upon the pleasure of definitely identifiable agencies or sovereigns. Such may be the case for new law which is international in its making, but not for the great body of it which, along with the new, is supernational when made.

The elimination of sovereignty would not only remove the confusion surrounding the meaning of a term which all too frequently connotes an absence of legal restraint and is needless for an under-

[6] Krabbe, *The Law of Nations*, p. 51.

standing of the essential nature of the law, but it would also do away with the vain hunt for "sovereign" states. Is Cuba sovereign? Is Danzig a state? Useless and pointless debates have been and can be staged upon these unprofitable items. The new Harvard research codes and some recent volumes like that of Bustamente ignore such questions, operating upon the far sounder premise that any political entity carrying on international relations is a state or a member of the community of nations. All states are restricted to some degree by outside legal and political considerations; the United States as a member of the International Labor Organization is subject to certain obligations; so is Egypt with regard to its treaty with Britain. To call some sovereign and the others partially or quasi-sovereign does not help to clarify the situation. All states or political entities possess authority to do certain things, and all are limited—even the greatest of Powers—in much of what they can legally do. The differences between states are not in regard to an elusive, mystical sovereignty, that is, a difference in kind, but a difference in degree of authority. The Danube Commission, Vatican City, the British Empire, and Lichtenstein have rights and duties within the sphere of their authority; and whether that authority be granted by treaty, charter, or historic position makes no difference in essence between the entities. Each has authority of some sort, large or small. The kind and amount of authority, not sovereignty, should be the objective sought.

Too often has international law, even by its devotees, been looked upon as a strange and peculiar branch of law, separated from other forms by that dazzling, bewildering something called sovereignty. Further, the absence of definite, positive sanctions has convinced the layman that international law is not "real" law, and has driven the international lawyer to make endless explanations and apologies. Sanction, however, in the sense of a specific penalty to be imposed for a breach of the rule, is not the all-important ingredient in law. The term law is more subtle than that. The primary element, as stated above, is the recognition on the part of the mass of the subjects of the law that they ought, and that it is to their interest, to abide by a given rule whatever its origin. Both "ought" and more mundane "interest" are involved in that complex nexus of law. Where a sense of ought or interest is lacking, a rule, despite a battery of formal penalties (e.g., the law of property in the Pennsylvania anthracite regions) is not true law. What

the law is at any given moment may be difficult to determine, but it is submitted that wherever there is any community or society, certain rules evolve which the members of that community regard as law and which they feel ought to be obeyed. Specific penalty threats help to induce conformity on the part of an unwilling fringe, but if the fringe of dissidents increases to become the core, all the penalties in the books cannot restore vitality to the now disregarded rule. Is the latter still "law"? Technically, perhaps, until repealed formally or by public burial through usage.

International law, therefore, intrinsically is no different from any other form of jurisprudence. The rules in regard to treaties and to diplomatic immunities are based upon the same type of community of interest and mutual need in the world society as exists behind the rules of contracts or of traffic regulations in the smaller domestic sphere. What differentiates international law from other law is not a matter of sanctions, sovereignty, and consent, but the question of the community to which it applies.[7] There is not so much of a community internationally as there is nationally; therefore, there is less law in international relations than in domestic. That is all. The difference is not in kind but in extent. Rules which states feel to be to their interest to obey, and which in time they consider *ought* to be obeyed, states for the most part *will* obey, without the need for comprehensive sanctions. It is the same for individuals within the state.

Space is lacking for a more thorough probing into the nature of law, a question which has been flirted with above in order to indicate some of the misunderstandings with which the ordinary student emerges from a study of international law. The usual textbook talk about absolute rights, sovereignty, consent, and sanctions is a jumble of words which leads the student to believe that international law is a unique kind of law. A further misconception frequently apparent is the belief that international law is a compact little system capable of covering most of the disputes between nations. What is suggested for international lawyers is that (1) they regard their laws as the product of a community, with bases identical with those possessed by rules in other communities, (2) they frankly admit that the extent of international society is relatively small, with a true community of interest existing on a rather limited number of topics, and (3) they pay more attention

[7] *Ibid.*

to the actual practice of states, regardless of fictions of sovereignty and equality, in order to determine whether new community rules are arising. Then, in answer to the query, What is the matter with international law?, it could be stated that (1) the current orthodox theory of international law is false, (2) too much is claimed for the law by its votaries, and (3) the lawyers have too long ignored certain political practices, which if brought within the range of the law, might make observance of the latter more palatable to existing nations.

And what of the positivists and the naturalists? As previously suggested, both have contributed and can contribute much to international law. In every community there are certain first principles upon which the edifice of the law is reared. Call them "natural" law, "original" law, "true" law, "fundamental" law, or *Ursprungsnorm*—it makes no difference. Without first principles, such as *pacta sunt servanda*, there can be no society and no law. Where do they come from? No conclusive answer can be given, but for legal purposes it is sufficient to note that they come into being and exist whenever human beings create a common society. Are they moral or legal? They are both, and it is just here that the Vienna school writers, so stimulating in many respects, wander into arid realms in their endeavor to separate "pure" law from "pure" morals. No clever surgery can neatly sever the two, even were such an operation desirable, which it certainly is not. The positivists can never escape from first principles, which are rules based upon something else than practice, though intimately related to practice. Law is more than mere practice, and it is more than a set of legal-moral imperatives. To slip into Kelsen vernacular, a legal norm (rule) has no meaning unless it is supported by considerable practice, and practice alone is not law unless there is an "ought," something truly normative, involved. International law, and all law, is hence a complex blend of what is done and what ought to be done. True positivism, therefore, should look to see what states actually do and what they believe they ought to do, and abandon the futile stress upon sovereignty and consent which have so little bearing upon the actual legal scene. The position here taken might also be termed "naturalism," in that the element of first principles is heavily emphasized; but the term "positivism" seems preferable, if it is kept clear that something more than mere practice is being considered as law.

As a result, international law emerges simply as those rules which states actually consider that they ought to abide by. Gone are rights antecedent to the community. Gone are sovereignty and for the most part consent, though the latter is needed for new laws. The number of rules is limited, far more limited than any textbook admits, because the community is so restricted in scope; but it is suggested that some of the behavior of the great states—behavior frequently contrary to the accepted tidy theories—should be scrutinized to see if in such practice sufficient oughts are not developing to warrant the appellation of "law in the making," though it is recognized that this means courting the danger of giving legal sanction to certain aspects of power politics. The Permanent Court of International Justice has recognized this point both in the Lotus decision and in the Danube Commission case, in which it made it clear that for custom to become law there must be a recognition that the usage "ought" to be followed. Note the compound of ought and practice. However, if states acquiesce long enough in certain practices, may not these practices come to have the character of law? The Monroe Doctrine would seem to be incipient law, though the orthodox shudder at such heresy. If it is objected that this is merely dignifying policy with the title of law, the retort may be made that in many respects law is simply crystallized policy. No attempt is here made to go beyond suggesting a new approach, but by some such means perhaps international law could be brought more into line with reality and would be removed from that fanciful realm of equal, sovereign, absolute rights which in practice are so frequently violated. By insisting upon the maintenance of such fictions, international lawyers only lead themselves and their students astray and bring the law into disrepute. A case in point is the Far Eastern situation, in which, instead of the clear-cut lines of jurisdiction and independence so dear to the heart of the usual positivist, is found a condition of legal osmosis with Japanese and Chinese oozing into one another in most shocking fashion.

Finally, even though a clarification and simplification of the fundamentals of international-law theory and an orientation toward political realities would immeasurably help the science of international law, the narrow scope of the law must be freely admitted. There is a considerable body of international law, true law, in every sense of the word, but there is no point in pretending that

international law is of vast extent when the world community of interest hardly goes beyond such prosaic items as weights and measures, bubonic plague, and the rights of diplomats. And if world society is to be divided into different fighting faiths, virtually all first principles may crumble; for what mutual interests and oughts exist between a fascist and a communist except a desire for one another's extermination? Law can scarcely be expected to fill such a yawning gulf created by social division. International society and international law may well disappear if states continue to align themselves along class lines, a phenomenon with which modern international law must deal, as it had to face religious cleavage during its infancy three hundred years ago.

Theory and Practice of State Administration. We all recognize the revolutionary technological changes in our culture during the last fifty years, but we frequently ignore the fact that we adjust our daily lives to these changes much more readily than we modify our social organizations and the theories by which we justify them. Most of our organizational changes have been hasty efforts to meet immediate needs. The result is patch-work which often fails to work at all or works badly. We justify these hodge-podge constructions by giving lip-service to out-moded theories which perhaps were sound before modern technology created a new world of social reality. At any rate, serious students observe many contradictions between what we actually do and the reasons which we give to justify our behavior. These "reasons" are more often what psychiatrists call rationalizations than what scientists would accept as rational theories.

This discrepancy between theory and practice is especially patent in the political institution. Modern technology has compelled a vast increase in governmental activities.[1] The new functions have been added in a higglety-pigglety, haphazard fashion to a governmental structure that is still about what it was in the simple, rural, handicraft, man-and-horse-power, pre-Civil War era. The result in practice is confused, contradictory, and almost unworkable government, especially in the states. There have been few fundamental changes in either the structure or theory of state government. We still believe that what was good enough for the pre-machine age Fathers is good enough for us, even though the result is semi-anarchy, inefficiency, waste of money, and failure to do well what obviously must be done.

We still give lip-service to the political theories with which we were born. Millions of Americans still accept such "principles" as: that government is best which governs least; one man is as good as another; all men are born with certain inalienable rights; any official entrusted with power is likely to abuse it and therefore we must have three independent branches of government, thoroughly checked and balanced; citizens can wisely decide any issue by ballot; the people are always right; *laissez-faire* is fair enough; all men have equal opportunities; our natural resources are unlimited and competition is the life of trade; bicameral

[1] In California, state functions grew from 73 in 1880 to 414 in 1931. W. B. Graves, *American State Government* (1936), pp. 372–373. H. D. Simpson admits this, but says the *ratio* of governmental activities to the sum total of human activities is probably no greater now than it was in the *laissez-faire* era a hundred years ago. "The Problem of Expanding Governmental Activities," *Amer. Econ. Rev.* (Supplement), Mar., 1934, p. 154. See J. W. Martin's discussion, *ibid.*, pp. 162–165, for the effect of technological changes on state government.

legislatures are really deliberative bodies, but they cannot be trusted to meet very often nor to sit very long; competent administrators and judges can be selected and elected by omnicompetent citizens, but only by means of political parties, preferably by two; politics, graft, and inefficiency are inseparable; states are sovereign, and local political units must be small, hence centralization inevitably leads to bureaucratic tyranny. These and many similar ideas are widely held, even though our actual experience proves them false or only partly true.

From time to time, our traditional theories conflict with political and social realities; then we see specters of fascism and communism and begin to doubt the virtues of democracy. We wonder whether the Democratic Dream is *merely* a dream after all—and a bad one. After fighting a tragic war to make the world safe for democracy, we begin to ask seriously just what this vaunted democracy really *is, if* it is. We are forced to redefine many traditional democratic concepts, to reformulate our theories, and to attempt political and social reorganization to realize our democratic objectives.

A previous paper outlined a state government in harmony with the technological realities of our present and probable future.[2] Therein it was argued that the concept of checks and balances is unsound in theory and unworkable in practice; that the legislative function is basic to democratic government and therefore must be performed continuously by a small number of experts, subject to the will of the people expressed both at the polls periodically and continuously through interest and pressure groups; that the political institution is a universal societal structure by which the corporate will is formulated and executed through organic legislative-administrative-judicial activities.

A state government was suggested in which a one-house legislature of not more than twenty-five well-paid, highly qualified members should be elected for long, overlapping terms from a few large districts into which the numerous counties should be merged. The legislature should be in continuous session; an expert reference and drafting service should be provided; a somewhat difficult initiative, referendum, and recall system was outlined; provision was made for integrating the legislative functions with the various vital interest groups. The relation of the judicial and administrative systems to the basic legislative organization was briefly indicated. The present paper will suggest an administrative system in harmony with the above theory of state government.

Administrative reorganization began in 1917 when Illinois consolidated most of its boards and commissions into nine departments directly responsible to the governor. Since then, more than half of the states have

[2] Read Bain, "Technology and State Government," *Amer. Sociol. Rev.*, Dec. 1937, pp. 860–877.

adopted similar systems, and most of the others have considered doing so. Administrative consolidation increases the power and responsibility of the governor, saves money by elimination of duplication, by budgeting and centralized purchasing, furthers the short ballot, and extends the merit system in selection and promotion of employees.[3]

Most students regard this movement as fundamentally sound, although some criticisms have been made.[4] Because state functions increased so rapidly during the period of administrative reorganization, it is not surprising that the promised economies have not materialized. The increased costs might have been greater under the old system, though it is difficult to prove. Nor is it wholly convincing that the per capita costs in unreorganized states is greater than in reorganized states. For example, in 1932, ten of the eleven states reorganized between 1917 and 1923 had per capita costs lower than those in adjacent states with comparable social and economic conditions. In the single exception, Kansas and Nebraska, the unreorganized Sunflower state wins by 57 cents. This is due, perhaps, to the doubtful economies of Governor Landon. Population densities are greater in some of the reorganized states. There is a rough inverse relation between density and per capita cost of government, but this is probably not sufficient to account for the $9.14 difference between Ohio and Michigan or the $37.48 difference between Maryland and Delaware.[5] We should have to equate many other factors before a fair conclusion could be reached. It is still more difficult to determine how much the widely ramifying activities of state government *should* cost. What can be done, perhaps, is to indicate possible savings by appropriate changes in organization. However, certain services must be rendered, and others are highly desirable and socially beneficial, no matter what they may cost. "Best service for least cost" is a good slogan, but it raises more questions than it answers. What services should be performed? What criteria of quality shall be formulated, and how? Shall first costs or long time costs guide our expenditures? These questions cannot be answered

[3] A. W. Bromage, *State Government and Administration in the United States* (1936), p. 341; W. B. Graves, *American State Government* (1936), p. 360; A. N. Holcome, *State Government in the United States* (3d ed., 1931), Ch. 11. See also the works of J. M. Mathews, J. A. Fairlie, R. Moley, G. Weber, A. E. Buck, and reports of reorganization commissions in various states, especially Illinois, New York (1919, 1926), Ohio, Virginia, Massachusetts, Kentucky, Tennessee.

[4] F. W. Coker, "Dogmas of Administrative Reform," in this REVIEW, Aug., 1922, pp. 399–411; for difficulty of measuring financial effects, J. M. Jacobson, "Evaluating State Administrative Structure—The Fallacy of the Statistical Method," *ibid.*, Nov., 1928, pp. 928–935.

[5] Data for density and per capita cost are for 1930 and 1932. *Statistical Abstract of the United States*, 1934, pp. 3 and 202. Of 26 states with per capita costs *above* the average, 16 had densities *below* the average.

intelligently without extensive research and the subsequent creation of socially intelligent public opinion.

It is notorious that both reorganized and unreorganized states were practically demoralized by the impact of the depression. The federal government came to their rescue. It is clear, as Simpson has pointed out, that many states have developed an almost parasitic relation to the federal government, and it will be a difficult and disillusioning period when they are finally compelled to depend upon their own resources. This parasitism was due, Simpson thinks, to the fact that the period 1920–30 was one of "conspicuous governmental incompetence" characterized by the "growth of a deep penumbra of racketeering practices around the ragged fringe of corrupt and incompetent government." The causes of the collapse were chiefly the outworn revenue system, the confusion and overlapping of administrative functions, and the low type of officeholders[6]—some of the very things administrative reorganization proposed to remedy. The result of this financial dependence on the federal government, as well as many other New Deal innovations, undoubtedly will be an intensification of the trend toward centralization that has been going on since 1890. This means continued extension of governmental functions in response to the technological changes which show no sign of abatement and the ever-growing demands of recreation, education, health, welfare, economic regulation, and social security which are inevitable results of technological innovation and elaboration. This will be as true of state as of national government. As the states lose their autonomy to the federal government, so the county and local governments are likely to become administrative units of centralized state governments.

The governor has gained power and responsibility in the reorganized states, but he is still elected, and in all but Maine, there are several other elective state officers. So the governor and the elective officers must be politicians first and administrators second. In such cases, state government frequently becomes an inefficient and unedifying spectacle. Furthermore, many boards and commissions have not been departmentalized.

[6] H. D. Simpson, citation in note 1. R. S. and H. M. Lynd, in *Middletown in Transition* (1937), pp. 120–128, 342–343, and elsewhere, give many instances of this parasitic effect. On the whole, however, they seem to think the long-run effects may be beneficial. For an intensive study of small community parasitism, see C. C. Zimmerman *et al*, "Littleville: A Parasitic Community During the Depression," *Rural Sociology*, Mar., 1936, pp. 54–72. See also, L. L. Ecker-R, "Revenues for Relief," *State Government*, Nov., 1934, pp. 235–246. Sixteen states had 15 per cent or more of their total population on relief—six, 20 per cent or over—in July, 1934. Altogether, 13.8 per cent of the total population of the United States was on relief. During 1933–34, the federal government furnished 63 per cent of relief funds, local communities 21 per cent, states 16 per cent.

Massachusetts is one of the best governed states, but about 80 of its administrative units are not departmentalized, and some of them are practically independent of the governor.[7] The same is true in other states.

Administrative reorganization can do little to shorten the ballot. Until county and local governments are also reorganized, the costly and disgraceful farce of too frequent elections of too many and too incompetent officials will continue. Albright found that Indiana had 319 names on its 14-square-foot (2,016 sq. in.) ballot in 1932. This is the most terrible example, but the thirty-one party-column states averaged 101.7 names and 564.6 square inches of ballot. The 16 office-column states were only slightly better. While the average number of state-wide propositions was only about 3.5, California, Louisiana, and Oregon had 20, 17, and 13, respectively.[8] We still have a long way to go before we get a ballot upon which even political scientists will have a fighting chance to vote intelligently.

The cost of elections is little short of a scandal. Pollock found that 1,600,000 more ballots than were needed were printed in Michigan. The cost of the primary and general election in 1932 was well over a million dollars, and would be about the same for non-presidential years. The costs in various counties differed so much that one is almost forced to suspect graft. The cost for the whole state was $0.557 per registered voter and $0.415 per vote cast in the two elections. Incidentally, only 67 per cent of the eligible voters registered in this extremely hard-fought campaign, and of course a great many of them did not vote.[9] In a similar study, Harris found a cost of $2.13 per vote in Columbus over a four-year period. Eight leading cities had costs between one and two dollars. Minneapolis and Salt Lake City were lowest, with $0.37.[10] When we add the increasing costs of electioneering, it is obvious that elections are very expensive. If rather rigorous criteria for candidacy were established, it might be more satisfactory to flip a coin.

The merit system has not fared much better. Bromage says that over half of the states do not accept it in principle, and Graves that the civil service has not done what we expected—there has been political interference, legislative preferences (especially to veterans), and a general tendency to reduce the efficiency of employees.[11] No merit system will

[7] *Mass. Manual for the General Court*, 1937–38, pp. 255–284.

[8] S. D. Albright, *How Does Your Ballot Grow?* (1933), quoted by Graves, *op. cit.*, pp. 117–118.

[9] J. K. Pollock, "Election Administration in Michigan," *Nat. Mun. Rev.* (Supplement), June, 1934, pp. 343–359.

[10] J. P. Harris, *Election Administration in the United States* (Washington, 1934), pp. 386–387.

[11] A. W. Bromage, *op. cit.*, p. 382; Graves, *op. cit.*, pp. 345–349. See also the work of L. D. White, L. Brownlow, L. W. Wilmerding, W. F. Willoughby, and the two

ever work satisfactorily until sound principles are formulated as to precisely what functions should be under civil service, how public servants shall be trained and selected, how they shall be promoted, and how incompetency may be dealt with justly and quickly. Any civil service which makes tenure so secure that incompetency is fostered, which perpetuates friction and conflict where personal and confidential relations are prerequisites for efficient performance, which makes seniority the sole or principal criterion for promotion, which permits, if it does not create, discourtesy to the public, and which can be subverted by politics, "pull," and pressure—such a civil service cannot be justified by sound theory. To say such a system is "better than a spoils system" is certainly a weak defense.

Centralized purchasing has made more progress and has effected considerable savings, but the opportunities here are still largely unrealized, even in the reorganized states. When Forbes wrote in 1929, 36 states had central purchasing, but in only two, West Virginia and Kansas, was the purchasing completely centralized. The most common exceptions are the educational, penal, and custodial institutions, and military, highway, and printing purchases. Forbes rightly points out that the proper principle of exception is classes of commodities, not classes of agencies. In over half of the states, the purchasing agencies were boards. Forbes regards this as the least effective type of organization. Much improvement may be expected here.[12] One phase of central purchasing sadly neglected in states is the development of testing, standardization, and specifications. Central purchasing was well under way a decade or more before administrative reorganization began, but it cannot produce the best results until the state governments have been completely reorganized.

The foregoing remarks deal with conditions which administrative reorganization was supposed to remedy. Some improvement has occurred, particularly in monetary savings; certainly, gubernatorial power and responsibility have increased, and there has also been some integration of

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reports of the Commission of Inquiry on Public Service Personnel, *Better Government Personnel* and *Problems of the American Public Service*, both published by McGraw-Hill in 1935. Also E. D. Graper, "Public Employees and the Merit System," *Annals Amer. Acad. of Pol. and Soc. Sci.*, Sept., 1935, pp. 80–89. For criticisms of the merit system, see T. J. Haggerty, "Spoils and the Racket," *Annals*, Jan. 1937, pp. 17–21. This entire issue is devoted to public personnel problems. See especially articles on training and internship by Wingo, Reeves, and Miles.

[12] The best treatise on this subject is R. Forbes, *Governmental Purchasing* (New York, 1929), but state purchasing is treated only slightly, and the book is, of course, nearly ten years out of date. See also L. D. White, *Trends in Public Administration* (New York, 1933), pp. 201–209. Up-to-date research in this field for states is greatly needed.

diffused and overlapping agencies.[13] The same trends can be observed to a lesser degree in the states not formally reorganized.

We cannot discuss the practices of state administration in much detail. It is notorious that most states are as grossly inefficient in what Graves calls the line services as they are in the staff or housekeeping functions. The administrative costs of the legislative and judicial branches must be included in the second category. While they do not constitute a very large proportion of the total moneys spent, there can be no question that bicameral legislatures, with hundreds of members and a cumbersome, antiquated organization, spend much more than necessary and do a much poorer job than ought to be and can be done. New Hampshire has 448 members in its legislature; Connecticut, 297; Massachusetts, 280; Vermont, 277; North Dakota, drought-bitten and poverty-stricken, 260; Georgia, 257; and 16 other states have over 150 each. Thirty states limit sessions to 60 days or less per biennium; hence, they do not get much, nor very good, legislative service for their money. The result is an increasing number of special sessions, with greatly increased expense.[14] When we contrast this with Nebraska's brief unicameral experience, we must conclude that great savings and better legislative service are likely to come from small one-house legislatures. The first one-house legislature in Nebraska is non-partisan, over one-third of the members are college graduates, 17 others have attended college, and more of the members have had legislative experience than in any other legislature in Nebraska's history.[15] Yet in the recent vote conducted by the American Legislators' Association, 59 per cent of the respondents were against unicameralism. Political scientists and professors voted for it, 85 per cent and 80 per cent; officeholders and Nebraska representatives voted against it, 75 per cent and 80 per cent; editors managed to hit the average exactly, as all good editors should.[16]

In staff services, it is clear that great savings and much better performance can be obtained by improving elections, tax systems, central purchasing, budgeting and accounting, selection and management of personnel, and by the consolidation and integration of agencies. However, the greatest monetary gains and improvements in performance can be

[13] A. J. Maxwell, "After Three Years," *State Government*, Jan., 1934, pp. 21–23, says that the North Carolina reorganization (1931) has saved millions and has given better services; S. A. MacCorkle, "Administrative Reorganization in Tennessee," *Southwestern Soc. Sci. Quar.*, March, 1934, pp. 319–332, says that it has not cured all the ills but has helped a great deal.

[14] *State Government*, May, 1930, p. 2.

[15] L. E. Aylsworth, "Nebraska's Non-Partisan Unicameral Legislature," *Nat. Mun. Rev.*, Feb., 1937, pp. 77–81.

[16] "Two Houses or One?," *State Government*, Oct., 1934, pp. 207–208. How many of the 6,000 ballots were returned is not indicated.

made in the line services. For example, in Massachusetts in 1935, the staff services cost only 13.8 per cent of the total expenditures, even when we include the more than two million dollars spent for military affairs. (One would think there was a civil war in Massachusetts!) This means that over $70,000,000 of the $82,000,000 spent in 1935 went for line services.[17] Other states would probably show a similar distribution. Proper analysis of this aspect of state government is beyond the scope of this paper, but it is clear that the formal organization and the outmoded theories by which it is justified produce confusion, waste, inefficiency, and frequently graft in the conduct of the line services.

Schools are still largely unconsolidated and are managed, or mismanaged, by "deestrict" boards; thousands of able-bodied criminals lie idle, each costing from three to five hundred dollars a year, while the state is paying private contractors, often too much, for various types of construction; the state spends millions to keep men in durance vile when it could save millions and rehabilitate instead of demoralizing thousands of men who should have been placed on probation or given early parole; states adopt old age pensions but still permit every county to maintain costly, cruel, and inefficient poor farms which are almost vacated when the aged poor are cared for by pensions; states spend enormous sums on colleges, full of duplication and inefficiency, to which students may come whether or not they know why they are there or whether they are able or willing to profit from educational opportunities; states spend great sums to educate doctors, lawyers, engineers, and other professional men and then allow them to charge what the traffic will bear, with little or no regard for the public welfare or societal repercussions of their activities; states sell liquor for revenue and for social control of drinking but they will not manufacture their own liquor so as to gain maximum revenue and complete control of the quality and quantity sold; states fine their citizens for driving more than forty-five miles an hour while spending billions on roads that cry aloud for ninety miles and permitting manufacturers to build and sell cars that can hit ninety without a quiver; states also permit thousands of petty local traffic regulations and delegate their enforcement to constables and hometown J. P.'s, both of which, to be very charitable, leave much to be desired. One could go on if space and patience permitted.

We must ask, however, what is the theory which permits such practices? There is much confusion of opinion as to what the state should do, and still more as to how it should do it. Consequently, the theory is as bad as the practice.

An earlier paper outlined a *theory* of state government consistent with a technologically mediated culture and suggested a *frame* of government

[17] *Report of Commission on Administration and Finance, Part II*, 1935, p. 1.

consistent with the theory, with special reference to the legislature. The organic interaction of the legislative, judicial, managerial, administrative, and technical functions was emphasized. In one sense, there are really only two political functions, viz., formulating and executing the corporate will. The executive would include the four last-named functions, unless for traditional reasons we should make the judicial a separate category. In actual practice, each always includes to some extent all five of the indicated functions. This is what I mean by the organic nature of political activity, the theory of which was briefly stated in the previous paper. It remains to sketch a *frame* of executive organization consistent with the general *theory* developed in that paper.

First, the executive (with managerial, administrative, judicial, and technical functions) must be directly responsible to the legislature, which must be responsible and responsive to the people. Second, since the legislature is a small, highly qualified, and relatively stable body in continuous session, all policy-determining functions which our peculiar system of fear, suspicion, and stupidity, i.e., checks and balances, short and infrequent sessions, judicial review, and so on, has delegated to boards and commissions, should be returned to the legislature. This greatly simplifies administrative reorganization. Third, since government should be more responsive to the actual daily needs of the people than is possible by means of elections, even when buttressed by initiative, referendum, and recall, the same principle of functional group representation outlined for the legislature should be applied to the executive.

None of the executive officers should be elected. This applies to judges, of course, since they are really administrative officers.[18] Most of the governor's duties should be transferred to the state manager. There are certain official, honorary occasions on which someone must speak for the entire state. These duties should be performed by the presiding officer of the legislature. Since it is an old and fairly honorable title, he should probably be called governor. He is the representative of the state's real governing body, its legislature.

The manager should be appointed by the legislature for an indefinite term and be directly responsible to it. This is not a new idea; it was proposed in Oregon in 1909 and by Harvey Walker in 1930, though both provided for appointment by an elected governor. Recently, however, Griffenhagen and Associates recommended to Wyoming a nine-to-twelve-

[18] The judiciary cannot be dealt with here except to say that the legislature should appoint the supreme court, which should appoint all other judges according to the principle of group representation; appointments should be made from a panel nominated by the interest groups in the jurisdiction where the judges will sit; recall or dismissal should not apply to judges, but every six or eight years the people in the jurisdiction should vote upon their retention. All judges should be state officers.

member, one-house legislature which should appoint a manager. They also advocated the abolition of all counties and all local schools. They apparently recommend a complete business corporation type of organization.[19]

The legislature should establish general qualifications for the manager, among which residence should not be one. Perhaps he should be between thirty-five and fifty-five, since he must retire at sixty-five; he should have the equivalent of the doctor's degree in one of the social sciences, and should have managerial experience in something other than a business corporation. When the legislature is considering an appointment, it should receive nominations and representations from all qualified interest groups, but it should make its choice upon its own responsibility. If the legislature wishes to remove a manager, it should give him and the interest groups that support and oppose him a full and fair hearing. While the manager is not subject to recall, if a petition is presented which bears the same relation to the whole state as a proper petition for the recall of a legislator in his district, the legislature must hold a hearing, but must decide the issue upon its own responsibility.

The manager appoints, and may dismiss, all department heads, but he should seek and seriously consider the wishes of the interest groups concerned. However, he must act on his own responsibility. The general qualifications for administrators established by the legislature should be roughly equivalent to those for the manager himself, since state managers are likely to be recruited from outstanding department administrators. The manager and his departmental heads should constitute an executive council, meeting at stated intervals and at the call of the manager.

The proper number of departments and the allocation of functions is a very important question. The present administrative reorganizations show only slight similarity in this respect. It is frequently argued that geographic and socio-economic factors differ so much that one state must have a department of mines, with agriculture relegated to the status of a bureau or division, while in an agricultural state the reverse might be true. This sounds plausible and in a few cases might be justifiable, but

[19] Harvey Walker, "Theory and Practice in State Administrative Reorganization," *Nat. Mun. Rev.*, April, 1930, pp. 249–254. After criticizing wholesale reorganizations, Professor Walker offers more radical proposals than any thus far adopted. However, the governor is retained as an elective officer and made the center of the government. Professor Walker's idea is essentially political. The Griffenhagen proposal, on the other hand, appears to be entirely economic and seems to ignore the social and political realities which are basic to the problem. I have not, however, been able to get the entire report. See Kirk H. Porter, "Surveys of State Administrative Organization: Iowa and Wyoming," in this REVIEW, Vol. 28, pp. 481–488 (1934). The Iowa report by the Brookings Institution is very conservative; the Griffenhagen report (Wyoming) is almost startling.

the crying need for uniform state action on an increasing number of matters and the need for comparable statistics of state activities make it highly desirable that there be as much uniformity as possible in the organization of all the states.

Most states could probably put all their agencies under the nine departments named below with much more logic than exists in the present departmentalization of any state. To make possible any meaningful discussion in the executive council, the number of persons present should not exceed 10 or 12. Since the manager will always be present, and usually one or two division heads, the number of departments should not exceed nine. Perhaps seven would be better. The fewer the departments, the less the cost and the greater the visibility, responsibility, and general efficiency of government. The suggested divisions and their allocation should not be taken very seriously. To do this job properly in any state would require a great deal of research, and even then, there would have to be revisions and transfers in the light of experience. New functions will be added from time to time, and some old ones will disappear. However, most of the functions now performed in the several states could, with some semblance of reason, be placed in the following departments and divisions. Two departments are suggested which are not now found in any state, but the technological nature of our society requires that the functions of these departments be vastly extended beyond what now exists. As time goes on, these extensions will inevitably occur.

1. *Department of Finance.* Divisions: Audit and Accounting, Banking, Budget, Corporations, Insurance, Purchase.
2. *Department of Revenue.* Divisions: Automobile, Liquor, Pensions, Special Funds, Taxation.
3. *Department of Law.* Divisions: Court Practice, Elections, Inspection, Investigation and Advice, Police and Militia, Public Utilities, Safety.
4. *Department of Health.* Divisions: Contagion, Hospitals, Mental Hygiene, Sanitation and Prevention.
5. *Department of Social Work.* Divisions: Child Welfare, Dependency Institutions, Family, Outdoor Relief, Prisons, Probation-Parole-Pardon, Recreation.
6. *Department of Education.* Divisions: Adult Education, Curricula, Institutions, Libraries and Museums.
7. *Department of Conservation.* Divisions: Agriculture and Soil, Fish and Game, Highways, Parks, Public Works, Water-Forest-Minerals.
8. *Department of Personnel.* Divisions: Civil Service, License and Examination, Personnel Records, Teacher Certification.
9. *Department of Research.* Divisions: Departmental Research, Planning, Reference and Drafting, Statistics and Records, Testing Laboratories.

Administrators would bear the same relation to division heads that the manager bears to the administrators. The administrator is manager

of his department, and division heads are managers of their divisions. The general qualifications of the division heads should be established by law, but appointment and removal should be the sole responsibility of the administrator under the group representational plan. It is clear that some officials appointed by division heads would bear the same relation to them as division heads bear to administrators; for example, presidents of colleges, superintendents of hospitals, chief engineers, park superintendents, and so on. Such appointments should be made under the group representation plan, perhaps in some cases only from names submitted by designated interest groups. Such appointees should have a free hand to choose their own staffs outside of the civil service when the function depends upon personal and professional qualities difficult or impossible to test by civil service methods. This would be true of private secretaries, teachers, lawyers, doctors, and some types of social workers. In such appointments, secure tenure should be insured with dismissal only after a fair hearing.

In general, all technical, clerical, skilled, and unskilled services should be under a classified civil service designed to obviate the defects noted earlier in this discussion. The adoption of the proposed legislative and administrative system would automatically solve many of the most vexing civil service problems. In all types of service which deal directly with the public, a system of merit-rating on such traits as courtesy, alertness, eagerness to be of service, tact, patience, etc., and their opposites, as well as performance on standardized tests, should count heavily in promotion, demotion, and dismissal. Every employee should have his complete record kept in the department of personnel. The general principles of modern personnel management should be observed. Among these are: initial care in selection and assignment, opportunity for growth on the job, transfer rather than dismissal, dismissal only as a last resort after a fair hearing.

Provision should be made for administrative courts in connection with each department. Every administrative officer has to formulate rules in order to execute the law. Interpretations of administrative rules and legislative laws should be as simple as possible and should be published widely. A good administrator will satisfy the complainant if he possibly can. If he cannot do so, the complainant should have a hearing before an administrative court. In most cases, this should consist of the officer immediately responsible, a person selected by the complainant, and a third selected by them. The hearing should be informal and conciliatory, not legalistic; a decision should be reached which is acceptable to both parties. If this cannot be done, then the complainant should be able to take his case—if he has one, which he usually does not—to the courts. In certain divisions such as utilities, workman's compensation, sanitation, and so

on, the number of cases would probably warrant a permanent administrative judge appointed by the supreme court. He would act in lieu of the division head, the other two members to be chosen as already indicated. This is a rapidly developing and extremely important aspect of administration.[20]

In conclusion, it should be noted that in both administrative and legislative functions, provision is made for constant interaction between public agencies and interest groups. They are the most vital expression of the people's needs. No democracy can be healthy which deplores their existence, calls them harsh names such as propaganda groups, pressure groups, and lobbies, and drives them underground to accomplish by doubtful methods what they should be encouraged to attempt openly.[21] It is more essential that they be integrated thoroughly with the legislature than with the executive agencies, but the latter should not be neglected, and we have made provision for them in the foregoing paragraphs. The probability is that they will play an ever-increasing part in both forming policy and carrying it into effect—unless, of course, democracy is really as rotten as Mussolini maintains. Such groups may have a powerful and salutary influence upon the administration of the laws which they have helped to make. Technological changes in our culture are largely responsible for the interests which these groups seek to serve; the very means by which they are organized and by which they carry on their activities are results of the technological developments of the last fifty years. Therefore they must sooner or later find a place for themselves in our governmental system, or we cannot remain a democracy.

State government has necessarily made some adjustments to the machine age, but this has been done largely by disconnected, and often disorganizing, growth. There has been some tinkering and tampering when the machinery has groaned too much or has almost stopped. Now it threatens not only to stop, but to fall to pieces. A thorough overhauling is certainly indicated. We face the necessity for fundamental reorganization both of theory and of practice. The two are organically related and will mutually condition and re-condition each other. The services rendered by government will probably continue to increase. We must invent or discover theories and formal organizations that will perform these services in the most efficient manner. Perhaps Nebraska has taken the

[20] Lindsay Rogers, "The Independent Regulatory Commissions," *Pol. Sci. Quar.*, March, 1937, pp. 1–17; E. E. Witte, "A Break For the Citizen," *State Government*, April, 1936, pp. 73–75; W. F. Dodd, *Administration of Workmen's Compensation* (New York, 1936), pp. 790 ff; J. B. Andrews, *Administrative Labor Legislation* (New York, 1936).

[21] P. H. Odegard, "Majorities, Minorities, and Legislation," *Annals*, Sept., 1933, pp. 29–46. See also Odegard's other work and that of E. P. Herring, E. B. Logan, H. S. Rauschenbush, F. E. Lumley, W. E. Mosher, and others.

first step on the new path. State government may soon be in the midst of as fundamental changes as those which began in cities over thirty years ago.

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Criteria for Evaluating the Effectiveness of State Government.[1] For some time, students of state government and state administration have been puzzled, and perhaps somewhat dismayed, at their inability to measure objectively the accomplishments of the governments of the several states. The same general problem was presented from another angle when, at a round table held in connection with the annual meeting of the American Political Science Association in Chicago in December, 1936, the attempt was made to measure objectively the results of the administrative reorganization code movement. If standards of achievement could be agreed upon, it might be possible for different investigators, working independently, to examine the same states with similar or comparable results. It should, likewise, be possible to compare the government of a given state before and after the adoption of a code providing for administrative reorganization, and to compare with some degree of accuracy the governments of states of similar size, population, industrial characteristics, etc.

A statement of the problem is not especially difficult, although all kinds of questions and difficulties beset the individual who attempts to work the problem out. In the first place, it is generally agreed that the tests should be objective—that they should exclude, or at least reduce to a minimum, the necessity for subjective judgments. It may be that all of the criteria here suggested suffer to some extent, at least, from this defect. The question of the adequacy of provisions of the state constitutions is one with regard to which reasonable men may differ. In New York, Pennsylvania, and many other states, there are, no doubt, many well intentioned and more or less well informed people who would insist that the existing constitutions are adequate, while other people, equally well intentioned and well informed, would insist that they are not. Similarly, there is no universally accepted standard as to what services are essential, in the second of the criteria suggested below, or as to what services are related and what unrelated, in the third of these criteria.

On the other hand, we have with regard to some matters been able to establish standards that are concrete and objective. This is true when, as

[1] This list of criteria was submitted to a number of authorities in the field for suggestion and criticism, and the comments received from Professors George C. S. Benson, of the University of Michigan, and Rodney L. Mott, of Colgate University, were particularly helpful.

in the fourth of the suggested criteria, one attempts to compare a given state with minimum standards that have been agreed upon for a particular field. Either a state has provisions for compulsory school attendance, and a minimum school program, or it does not. It has prohibitions of night work for women, or the employment of women in dangerous occupations, or it does not. It either does or does not prohibit child labor, sweat shops, and industrial home work. These laws either are or are not enforced. It may require time and money to conduct a suitable investigation to find out, but the facts do exist and they can be obtained. This leads to the conclusion that if we can come to some agreement on some standard tests of adequacy in constitutional provisions, or some accepted standards of judgment on such questions as what services are essential and what ones are not, what services are related and what ones are not, and other similar problems, we may be able to answer the larger question.

In an article such as this, it is impossible to develop all of these questions at length, but the following may be taken as illustrative. Elsewhere, it has been suggested that a state constitution must contain at least four things:[2] (1) a bill of rights; (2) an outline of the framework of the government; (3) some provision on the basis of which the powers of the government may be determined; and (4) provision for amendment and change. Now it so happens that all four of these standards are in such general terms that all of the state constitutions meet all of them, unless it be the last. May it not be that by refining and particularizing these items, and including others, we may get the objective standards which we are seeking; for instance, does the recent history of the amending process in the state indicate that the people can secure, with reasonable promptness and certainty, constitutional changes which are demanded by public opinion? Do the provisions of the constitution, as interpreted by the courts, permit the adoption and enforcement of laws providing for such things as graded taxes, unemployment insurance, minimum wages—things which are regarded as desirable by experts in their respective fields? Such a procedure might lead to the development of a scale in which the four original standards might be increased to one or two dozen, but if this procedure were followed here, and in connection with other similar matters for which we now have no objective standards, perhaps such standards could be developed.

Another major difficulty relates to the purpose of the evaluation—the question of what is to be measured, why it is to be measured, and how it is to be measured.[3] A political scientist may be desirous of measur-

[2] *American State Government* (Boston, 1936), pp. 59–63.

[3] Clarence E. Ridley has done a good deal with the problem of measurement in the municipal field; see, for instance, his series on measurement standards, done with Herbert A. Simon, in *Public Management*, Feb., Mar., and following, 1937.

ing the effects of the movement for administrative reorganization, of measuring the general effectiveness of a state government, in order to see how nearly it is in line with what are commonly regarded as the best practices in other states, or of finding some means of appraisal which will help to develop new and better practices that may lead to improvement in the future. The major purpose will likely determine the kind of tests one sets up, and the manner in which they are applied. One student has suggested that part of the items below are of special value to the political scientist who wants to gauge the general effectiveness of his state government, while another combination would best serve the purposes of the scholar who was desirous of developing new and better administrative practices.[4]

In the field of education, experts have worked out all kinds of tests for all sorts of purposes; in their early stages, many of these were not very satisfactory, but they are gradually being perfected. In the field of public opinion, tests are being perfected to indicate the nature and intensity of opinion on various controversial questions. Students of municipal government have devised techniques of measurement. In all of these fields, the testers are dealing with concepts quite as abstract, with ideas quite as intangible and elusive, as are involved in the present problem. It may be that the development and application of similar methods will eventually lead to the solution of this problem.

So far as evaluation of the effect of the administrative codes is concerned, one may well question the necessity of trying separately to evaluate the codes as such. If we can develop objective tests of state government—tests which will provide a sort of common denominator—and these tests are generally applied, it will be easy to see whether states with codes generally rank higher than those without, and if so, for what reasons. It should be possible also to compare conditions in the same state, before and after the adoption of the code, or to measure the progress made during some definite period, such as a decade.

Accompanying this article is a list of criteria which are believed to be pertinent in any attempt to evaluate the effectiveness of state government and state administration. It includes most of the more common bases for judgment, but it may not be comprehensive, or as objective as such a list should be. It may not be adequate for the purpose, but it is presented, with accompanying comments, as a first step and as an indication of a possible method of approach. Perhaps the next step should be for the students of state government to agree upon this list, with such additions and modifications as may seem desirable, and then proceed to weight the various items according to their relative importance. These

[4] For the first purpose, see Nos. 1, 2, 3, 4, 5, 7, 9, 11, 14, 15, and 16; for the second, Nos. 1, 2, 8, 11, 12, 13, 15, and 16.

judgments might be more or less subjective, but a group of competent scholars might be able to come to some sort of agreement. Let us suppose that these sixteen items—more or less—were ascribed a weight as suggested, the total of all the weights to equal exactly 100.

Investigators might then agree upon such numbers of objective questions as might, in their opinion, be required to bring out the necessary information with regard to each of the weighted points. For convenience in scoring, the number of questions used with regard to a given point should probably be the same, or in multiples of the number ascribed for weighting purposes. Thus if the point with regard to the adequacy of the constitution were weighted at ten, there might be five objective questions worth two apiece, ten worth one apiece, or twenty worth one-half of one apiece. The number of questions on any one point might be large or small, but the weighting procedure would prevent over-emphasis on good points, or the pulling down of the total score by unduly emphasizing the shortcomings and failures of the state. All of the sixteen criteria listed here represent legitimate bases for judging the effectiveness of a state government, but much care would have to be taken to avoid sectional influences in the framing of the questions.

Thus with regard to motor vehicle registration, it would be proper to inquire whether or not a state has a title law, whether it has an annual or semi-annual inspection of motor vehicles, or whether it requires the regular registration of motor vehicle operators; a question of maximum speed permitted under the law, on the other hand, depends so much on the density of population that it could not properly be applied to all the states. In the field of interstate relations, it would be proper to consider whether or not a state tries to bid against its neighboring states by extreme liberality in its laws on marriage and divorce, or incorporation, but one could scarcely use coöperation in irrigation or flood control projects, because problems of neither of these types exist in all of the states. In taxation and finance, one might inquire regarding an executive budget; actual full value assessment; the existence of a state-supervised, scientific system of assessment, and of a centralized county-unit tax collection system; the existence of improved techniques and procedures in fiscal supervision and control, regarding purchases, contracts, salaries, etc. Substantial aid in the selection of suitable questions in a given field could, of course, be obtained from special studies and monographs.[5]

[5] See, for instance, in agriculture, Arthur W. Gilbert, *What's What of State Departments of Agriculture* (mimeographed, 1928); in education, the criteria used by the United States Office of Education and the National Education Association for rating purposes; in highways, comparative data on highway safety; and in welfare, the state-by-state series issued by the Works Progress Administration, Social Research Division, covering analysis of constitutional provisions affecting public

The author makes no claim to having solved this difficult problem. The problem of weighting cannot be solved until there is agreement on the points to be used as general criteria, and a list of such points is here presented for discussion. Numerous questions with regard to some of the points have been suggested, but again the author has no list to present, acquired either as a result of hard work or of revelation. It seems clear that the problem must be solved through the coöperation of a group of recognized scholars in the field, from all sections of the country, if it is to be solved at all, and if the solution is to be accorded widespread acceptance. Considering the vastness of the subject and the limitations upon the knowledge of any single individual, it seems unlikely that such acceptance would be forthcoming for a solution so arrived at.

SUGGESTED CRITERIA

1. *Adequacy of constitutional provisions.* Is the constitution adequate for the needs of a present-day state? If not, what efforts have been made for revision? Has the state been able to obtain amendments necessary to secure adequate powers for state agencies, to eliminate elective state officers, to centralize responsibility, etc.?

2. *Provision for the essential services of state government.* Are all the essential services of a state adequately provided for in the administrative structure? Such a list can be determined by comparison of a number of leading states, or by use of the Bureau of the Census classification of the functions of state government.

3. *Failure to combine related services, or miscellaneous ones.* Is there evidence of the failure to combine, under a single administrative direction, services that are related in character? Has the state refrained from setting up, independently, parts of the same service, or services of secondary importance? Examples include the maintenance of the inspector of tobacco as an independent department in Maryland, or the failure to consolidate agencies of conservation in Pennsylvania.

4. *Minimum standards for administrative services.* To what extent do the departments of the state meet the minimum standards set by recognized agencies in their respective fields? Such standards have been set up for bovine tuberculosis eradication, public education, mortality and morbidity statistics, crime reporting, etc. To what extent do the agencies of the state meet these standards? Has the record of the state in this respect improved since reorganization?

5. *The rank of the state with regard to its activity in particular fields.* In a number of administrative fields, such as education, responsible independent agencies attempt to rank the forty-eight states annually, or at other frequent intervals, according to the quality of their legislation and the effectiveness of its administration. If the state has been reorganized, how has this affected its rank?

6. *The total cost of government.* While, in all probability, the total cost of government will not have been reduced greatly, if at all, due to expansion

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welfare, digest of the public welfare provisions under the laws, and organization and procedure of the department of public welfare.

in many fields, can it be shown that the people get more service per dollar spent now than they got formerly, whether or not the state has been reorganized? Can it be shown that they get comparatively more or less per dollar spent than do the people in neighboring states, comparable in character? One realizes, of course, that it is exceedingly difficult, and that it may be impossible, to secure this type of data.

7. *Fiscal administration.* To what extent are the latest improved methods of budgetary procedure, and of fiscal control, employed in the conduct of the business of the state? Included here are such questions as coördination and control, proper tools, work methods, and supervision.

8. *Character of incumbents of the governorship over a period of years.* While it must be admitted that this question is not one which can be measured by objective tests, it is interesting, and it may be significant, to compare the kind of men elected to the governorship in a reorganized state, before and after reorganization. If our theories are correct, such a comparison should disclose the choice of men of greater ability and capacity for leadership, since reorganization, due to greater incentive and opportunity.

9. *Personnel policy.* Is the state one of those with a civil service law? Was it adopted before or after reorganization? To what extent does the state employ the merit principle in individual services, if there is no general civil service law, as in Pennsylvania in the staff of the state liquor control board, or as has been proposed for the personnel of state welfare institutions?

10. *Statistical comparisons.* Statistical comparisons of several types have been suggested in Nos. 4, 5, and 6 above. Other types may be possible, and where they can be validly made, they should be encouraged. At the same time, one should not forget the limitations of statistical methods in dealing with problems of the type here under consideration.[6]

11. *Citizen participation in government.* Prior to reorganization, and to a much larger extent than most people realize since reorganization, literally hundreds of private citizens have served on boards of trustees, commissions, and other similar public bodies. To what extent has reorganization brought about a more effective and better organized handling of this problem of citizen participation?

12. *Relations with the federal government.* To what extent has the state shown initiative in the solution of its own problems of government? In its relations with the federal government, has it shown a willingness to coöperate for the development of uniform policies and effective administration? At the same time, has it shown any resistance toward encroachment upon its powers by the federal government?

13. *Interstate coöperation.* Under present-day conditions, the problem of effective interstate coöperation becomes increasingly important. To what extent has the state coöperated in this movement, establishing suitable machinery, and attempting to make it work?

14. *Proper supervision of the activities of local units.* Recent developments have made it increasingly clear that the states must exercise supervision and control of the functioning of their local units in various fields.

[6] See, for instance, J. Mark Jacobson, "Evaluating State Administrative Structure—the Fallacy of the Statistical Method," in this REVIEW, Nov., 1928, pp. 928–935.

To what extent has the state shown initiative in this matter? To what extent has it set up helpful and reasonably effective controls over the activities of local units in education, finance, health, highways, welfare, etc.?

15. *Success in securing progressive economic and social legislation.* It is well known that we are living in an era of important developments in the field of economic and social legislation. Do the reorganized states succeed better than those not reorganized in securing such measures with reasonable promptness? While this is not a problem of administration, the establishment of such a correlation would be interesting, as indicating that reorganization contributes something to the responsiveness and effectiveness of state government in general.

16. *Public reporting and public relations.* The importance of good public reporting and of good public relations is now well recognized by students, but not by all legislators, or even by all administrators. What provision is made in the various departments for the handling of these problems? Does a reorganized state handle them better than before reorganization?

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An Unamended State Constitution: The Tennessee Constitution of 1870. The constitution of Tennessee exists today in exactly the same form as that in which it was adopted sixty-eight years ago. It is by no means the oldest state constitution in existence in the United States; reckoning from the dates of adoption, fifteen state constitutions are older, thirty-one are newer, and one, that of Illinois, is of the same age as the Tennessee constitution. But every one of the other forty-seven constitutions, regardless of age, has been amended since the adoption of Tennessee's fundamental law in 1870; in fact, with the exception of Tennessee, there is not a state whose organic law has not been amended since 1912.[1]

It is true that the age of a constitution, or the absence of any revision of it, is no proof of its excellence or inadequacy. Nevertheless, it is interesting that the fundamental law of a state should have withstood every attempt at revision throughout a period characterized by extensive social and economic change. During this time, Tennessee has progressed from an agrarian economy to a semi-industrial economy. In the production of commodities to supply increasing human wants, corporations and holding companies have been formed, thereby creating new problems the solution of which has to rest upon government. Likewise, social relationships have become complicated, and these complications have added to the many problems which government ultimately will be forced to solve.

[1] See the state constitutions; also this REVIEW, Vol. 27, pp. 232–236 (Apr., 1933); Vol. 28, pp. 245–250 (Apr., 1934); Vol. 29, pp. 432–437 (June, 1935); Vol. 30, pp. 275–279 (Apr., 1936); Vol. 31, pp. 280–285 (Apr., 1937).

The people of the state have rather willingly accepted industrial and social progress, but they have always looked unfavorably upon reforms that would make an up-to-date institution of the government in all of its divisions.[2]

With many constitutional changes taking place in the other states, one might expect that sooner or later similar developments would come in Tennessee. Since 1900, more than 1,500 amendments have been adopted in the other forty-seven states, and nearly 400 of these date from 1927. In this latter period, no fewer than 160 fundamental changes took place in the states of the Southern group—a section generally regarded as ultra-conservative.[3] In the midst of all this, Tennessee has remained unperturbed; not once has the state even ventured near constitutional revision, except for a proposal, in 1916, to call a convention; and this was defeated by more than 3,000 votes.

Clearly enough, the views of the people of Tennessee on questions of constitutional reform have always been extremely conservative. The state has had, in its own right, only three constitutions. The first one was in effect from 1796 to 1834, and was never amended. The second, which to a limited degree modified the former document, underwent only two changes. In 1853, popular demand for election of judges and prosecuting attorneys by the people became so insistent that it was not a difficult task to secure an amendment. Likewise in 1865, the "Radicals," acting under the stress of Civil War conditions, succeeded in forcing an amendment abolishing slavery. The present constitution was adopted in 1870, not because of any conviction that the existing document was in need of fundamental revision, but largely as a political expedient to restore to political power the disfranchised elements of the white population. In view of this, it is not surprising that the new constitution contained few provisions that were actually new. In fact, the changes made in 1870 were so unimportant that, to all intents and purposes, Tennessee is living today under a fundamental law framed in 1834. Indeed, in many essential features the state's present constitution is little different from that of 1796.[4] It may be of interest to review the efforts in behalf of constitutional reform since 1870 with a view to ascertaining why the state still remains an island of resistance to change.

Consideration will be given first to the efforts to secure a revision of the constitution by use of the convention method. For this part of the study,

[2] C. P. White *et al.*, *Constitutional Problems in Tennessee* (Knoxville, 1937), p. 8.

[3] *Ibid.*, p. 114; C. C. Rohlfing, "Amendment and Revision of State Constitutions," *Annals of the American Academy of Political and Social Science*, Vol. 181, pp. 180–181 (Sept., 1935).

[4] Joshua W. Caldwell, *Studies in the Constitutional History of Tennessee* (2nd ed., Cincinnati, 1907), pp. 189–190, 295–305.

Table I has been prepared. By referring to it, one will observe that the eight proposals which came to a popular vote passed the two houses of the legislature in nearly all instances by rather substantial majorities.[5] At least, the legislature was willing, at rather frequent intervals, to offer the people an opportunity to vote on this method of reform. Whether it always acted in a sincere manner, or often only for political reasons, cannot be determined definitely. The fact that at one time (1926) most of the members of the General Assembly signed a written pledge to support a movement for constitutional reform at about the same time that they proposed the question of a constitutional convention might lead one to suspect questionable motives in connection with their acts on previous occasions.[6]

TABLE I

PROPOSED CONSTITUTIONAL CONVENTIONS, 1870–1935

Date of election	*Percentage of membership by which question carried in*		*Popular vote on conventions*			*Vote for governor*	*Total vote on convention compared to vote on governor* (*Percentage*)	*Affirmative vote on convention compared to vote for governor* (*Percentage*)
	House	*Senate*	*For*	*Against*	*Affirmative vote compared to total vote*			
1882	52	72	—	—	—	—	—	—
1897	55.5	51.5	—	—	—	—	—	—
1897	—	63.6	22,450	113,158	16.3	320,580	42.3	7
1913	52.5	54.5	—	—	—	—	—	—
1916	60.6	51.5	63,940	67,335	48.7	266,641	49.2	23.9
1917	82.8	75.7	20,903	85,161	18.8	266,641	39.8	7.8
1919	67.6	66.7	7,680	41,839	15.5	158,147	31.3	4.8
1924	64.6	90.9	93,081	135,875	40.6	283,119	80.9	32.8
1926	73.7	54.5	27,978	43,335	39.3	131,217	54.4	21.3
1931	73.7	66.7	9,685	49,313	16.4	240,235	24.5	4.03
1935	62.6	54.5	—	—	—	—	—	—

Three different times the people of the state were deprived of the opportunity to vote on the question of a convention after the proposal had been referred to them by the legislature. In 1896, a special session provided for a vote on a convention to be held in April, 1897.[7] The ensuing legislature repealed the resolution and passed another, apparently because objections had been made to the apportionment of delegates to the convention, to the age qualification for the delegates, and to the expense of a convention unlimited as to time. The resolution of 1897 specified a time limit of seventy-five days. No per diem was allowed, but the delegates were permitted to draw from the public treasury two dollars a day for

[5] The votes in Tables I, II, and III on the proposals in the legislature have been compiled from the Tennessee *Senate and House Journals*, 1870–1935, and they are the votes on third reading. The popular votes in Tables I and II have been compiled from the election books in the office of the secretary of state, Nashville. These election returns are incomplete. So far as could be determined, the Nashville and Knoxville newspapers did not carry the complete results of any elections. The question of calling a convention can be submitted to the people at any time by a majority of all the members elected to each house of the legislature.

[6] *Proceedings* of the Tennessee Bar Association (Nashville, 1936), pp. 46–47.

[7] *Acts of Tennessee*, 1896, ch. 1.

their board, in addition to expenses incurred in going to and from the place of meeting.[8]

In 1913, the legislature favored submission of the question of a convention, but Governor Benjamin Hooper vetoed the resolution because it had been passed by the house of representatives when a constitutional quorum was not present.[9]

In 1935, the General Assembly again voted to submit the question of a convention, but later rescinded its action in a special session in August of the same year.[10] Governor Hill McAlister felt that the people would reject the proposal at the polls, and he thought it useless to expend money from a well-nigh depleted treasury upon a lost cause. He was able, therefore, to secure the coöperation of the legislature in passing a resolution urging the governor and secretary of state to ignore its previous action.[11] This resolution implied that the proposal would be submitted at a more opportune time, which, however, has not yet presented itself.

When the eight proposals to call a convention came before the electorate, they were by no means so well received as they had been in the legislature. While two of the propositions received over forty per cent of the total vote cast, the average affirmative vote on the seven occasions for which statistics are available did not exceed twenty-eight per cent. This affirmative vote, when compared with the total vote cast on the convention, is exceedingly low, but when a comparison is made between the affirmative vote on the convention and the total vote cast for governor the results are almost unbelievable. At no time did the total vote on a convention reach eighty-one per cent of the total vote for governor, and in the special election of 1931 the convention proposal polled only one-fourth as many votes as were cast for all candidates for governor in 1930. Once more it is demonstrated that personalities rather than abstract questions make the greater appeal to the electorate.

On one occasion only, in 1916, did the people show any serious interest in the calling of a convention. Because of the support of many nonpartisan organizations, constitutional reform then lost by a very small vote. When the proponents of reform, encouraged by the results of this election, pressed the question in 1917, and again in 1919, they lost by increasingly heavy majorities. The great interest in the World War in 1917 and the reaction of the conservative rural people in 1919, whose vote in some counties ran as high as nine to one against the proposal, aided in defeating the effort.[12]

[8] *Acts of Tennessee*, 1897, ch. 11; *Senate Journal*, 1897, p. 467.

[9] *Senate Journal*, 1913, pp. 910–911.

[10] *Public Acts of Tennessee*, 1935, ch. 127.

[11] *Public Acts of Tennessee*, First Extraordinary Session, 1935, p. 857.

[12] *Proceedings* of the Tennessee Bar Association, 1917, p. 82; Knoxville *Journal and Tribune*, July 29, 1917.

Assuming that the people were afraid to trust to a convention with unlimited powers the duty of rewriting the fundamental law of the state, the proponents of constitutional reform succeeded in getting legislative proposal of conventions limited to the consideration of specific issues. The convention of 1916, if held, was not to have been restricted in its action, but any amendments which it might submit to the electorate were to be voted on specifically. In 1926, and again in 1931, the people voted on proposals to hold a convention whose work should be limited to nine and four propositions, respectively.[13] In each instance, the results of the popular election were negative; the people were no more willing to support a limited convention than an unlimited one. The large affirmative vote on the convention in 1916 was not the result of the type of convention proposed, but rather is to be attributed to the effective work of non-partisan organizations.

Meanwhile, the voters of the state have had opportunity on four separate occasions to consider ten specific amendments to their constitution. The small number of proposals which emerged successfully from the legislative gauntlet is due, perhaps, to the cumbersome process involved rather than to a lack of interest on the part of the legislature. The constitution requires a proposal by two successive legislatures, by a majority in the first and by a two-thirds majority in the second, followed by a popular referendum in which a majority of all those voting for representatives must favor the amendment.[14] As we shall see, a much larger number of proposed amendments passed the first legislature but failed to secure

[13] For the two views on the validity of a limited convention, see H. B. Witham, "On Amending the Constitution of Tennessee," *Tennessee Law Review*, Vol. 11, pp. 178–180 (Apr., 1933), and O. T. Tindell, "The Validity of the Act of 1925 Calling a Constitutional Convention in Tennessee, *ibid.*, Vol. 4, p. 203 (May, 1926). The nine proposals were as follows: (1) a classified property tax, (2) limitation of legislative enactments to public issues, (3) increase in membership of the supreme court, and investment of the court with the power to give advisory opinions, (4) increase in the per diem of legislators and a decrease in their number, (5) easier amendment process, (6) authorization of legislature to pass laws to induce a more general exercise of the franchise, (7) extension of term of office for governor with an ineligibility provision, and extension of terms of other officials where legislature deemed it advisable, (8) adoption of an official code, (9) authorization of legislature to abolish the fee system where deemed necessary. In 1931, action of the proposed convention was to be restricted to four issues as follows: (1) a classified property tax, (2) consideration of local affairs by local bodies, (3) increase in per diem for legislators, (4) extension of the term of office for governor.

[14] The constitution provides that amendments shall be ratified by a majority of all the citizens of the state voting for representatives. The vote on the amendments should, therefore, be compared with the total vote on representatives if the best results are to be obtained. It was possible to determine the total vote for representatives in only a few instances; hence the vote for governor was used, and it has been found that the latter vote does not differ greatly from that for representatives.

the required majority in the second, and this would seem to bear out the above observation. Nevertheless, as can be seen by Table II, the ten proposals which came to a vote of the people had little difficulty in either legislature. All passed the second legislature by majorities greatly in excess of the two-thirds requirement, despite the fact that in each case they had lain dormant for the two-year interim between the two meetings of the legislature. Yet when they came before the electorate these specific proposals fared no better than did those for the calling of conventions, whose submission generally followed immediately their proposal by the General Assembly.

TABLE II

PROPOSED AMENDMENTS TO THE CONSTITUTION OF TENNESSEE, 1870–1935

Date of election	*Title of amendment*	*Percentage of total membership by which passed in two legislatures*				*Popular vote*			*Affirmative vote on amendments compared to vote on governor*
		First legislature		*Second legislature*		*On amendments*		*On governor*	
		House	*Senate*	*House*	*Senate*	*For*	*Against*		*(Percentage)*
1887	Prohibition.	59.5	60.6	91.9	93.9	117,504	145,234	235,988	49.7
1904	Limitation on local governmental indebtedness.	59.5	63.6	80.8	81.8	50,353	—	236,021	21.3
1904	Popular election of secretary of state.	65.6	78.7	78.7	90.9	58,975	—	236,021	24.9
1904	Popular election of treasurer and comptroller.	67.6	72.7	79.7	90.9	57,757	—	236,021	24.4
1904	Local legislation to be permitted on roads, game, and fences.	69.6	69.6	84.8	90.9	56,290	—	236,021	23.8
1904	Exemption of manufacturers from taxation by local governments.	64.6	54.5	80.8	72.7	52,517	—	236,021	22.2
1904	Four-year term for governor.	68.6	66.7	79.7	90.9	57,834	—	236,021	24.5
1904	Increase in terms of some county officers.	68.6	66.7	74.7	84.8	57,363	—	236,021	24.3
1922	Classification of property for taxing purposes.	66.6	69.6	83.8	84.8	—	—	243,588	—
1932	Increase in per diem of legislators.	75.7	69.6	72.7	90.9	15,167	59,309	240,235	6.3

The one occasion on which the people displayed any great interest in proposed amendments was in 1887, when the only serious attempt was made to write into the fundamental law of the state the prohibition of the manufacture and sale of intoxicating liquors. While the total vote for and against this proposal exceeded the total vote cast for governor in 1886 by 11.3 per cent, it was only eighty-seven per cent of the total gubernatorial vote in 1888. The other proposals, only two of which concerned things fundamental in character—the classification of property for taxing purposes and the limitation of local indebtedness—aroused only mild interest. The affirmative vote on these proposed amendments never exceeded twenty-five per cent of the total vote for governor. In 1922, the

proposal to classify property for taxing purposes did not come to a popular vote. One week prior to the election, the state election commission issued an order to the local election commissions not to place this proposal on the ballots, since it had not been given the publicity required by law. Apparently the proposition had not been advertised in the press of the state six months prior to the election of the members of the second legislature.[15] The efforts to secure constitutional change by the amendment process, therefore, proved as futile as attempts by the convention method.

During the period from 1875 to 1935, twenty proposals for amending the constitution passed one legislature, only to be lost for one reason or another in the second. With the possible exception of two proposals—one to regulate suffrage and elections and one to amend the amending process of the existing constitution—none of this group of proposed amendments concerned fundamental changes in the machinery or functions of government. Of the proposals which passed the first legislature by substantial majorities, only four received any serious consideration in the second legislature. The proposal in 1901 to consolidate chancery and circuit courts passed the lower house in 1903, but failed in the senate for want of a constitutional majority. In 1921 and 1931, respectively, the lower house of the second legislature defeated the proposals to amend the amending section of the constitution and to extend the term of office of the governor. Two attempts were made to propose an amendment to change the uniform taxation clause by substituting for it a clause permitting the legislature to classify property for taxing purposes, but both efforts were unsuccessful in the lower house. Governor Austin Peay sent a lengthy message to the legislature in 1927 urging the adoption of this reform when it was before the second legislature.[16] At that time, and again in 1931, the measure was defeated in the lower house of the second legislature, largely because certain legislators were afraid to trust the General Assembly with the enactment of laws for the amplification and application of the amendment. The reasons why the proposals of 1909 were sidetracked in 1911 in favor of fresh proposals on the same subjects have remained obscure. Nor has it been possible to determine the cause for the failure of such scattered proposals as those of 1875, 1915, 1929, and 1935.[17]

In attempting to account for the failure of constitutional reforms in Tennessee, some observations are pertinent. That the present constitu-

[15] Knoxville *Journal and Tribune*, Oct. 31, 1922.

[16] *Senate Journal*, 1927, pp. 118–119.

[17] In 1937, amendments were passed by the legislature providing for an increase in the term and compensation of the governor, an income tax, and a lieutenant-governor. These are awaiting action by the second legislature, which will convene in 1939. Information is not available on the vote on these proposals in the legislature, nor on the vote on the proposition which carried over from 1935.

TABLE III

PROPOSED AMENDMENTS WHICH FAILED IN THE SECOND LEGISLATURE, 1870–1935

Date of first proposal	*Title of amendment*	*Percentage of total membership by which passed first legislature*		*Percentage of total membership voting affirmatively in second legislature*	
		House	*Senate*	*House*	*Senate*
1875	Increase term for governor and legislators.	58.6	80	No consideration	
1891	Power of legislature to enact local laws on roads, fences, and elections.	78.7	66.7	Failed to come to vote on last day of session.	Failed on second reading
1901	Consolidation of circuit and chancery courts.	61.6	55.5	64.6	42.4
1909	Election of all state officers on same day.	70.7	84.8		
1909	Increase in terms of county officers.	72.7	70.		
1909	Popular election of secretary of state.	77.7	60.6		
1909	Popular election of comptroller and treasurer.	71.7	60.6		
1909	Popular election of attorney-general.	70.7	63.6	No consideration given in either house.	
1909	Four-year term for governor.	73.7	63.6		
1911	Popular election of secretary of state.	77.7	72.7		
1911	Popular election of comptroller and treasurer.	83.8	81.8		
1911	Increase in terms of county officers.	80.8	78.7		
1911	Four-year term for governor.	83.8	78.7		
1911	Popular election of attorney-general.	54.5	78.7		
1915	Regulation of suffrage and elections.	70.7	66.7	No consideration.	
1919	To amend the amending section.	67.6	60.6	Tabled on third reading.	69.6
1925	Classification of property for taxing purposes.	59.5	72.7	Passed but no vote recorded.	60.6
1929	Four-year term for governor.	68.6	70	Never came to third reading.	90.9
1929	Classification of property for taxing purposes.	71.7	72.7	50.5	75.7
1935	Four-year term for governor with immediate ineligibility.	66.7	84.8	Record incomplete.	

tion, framed in a period when a constitution was regarded as a statement of principles rather than as a repository for materials of a legislative character designed to curb the various agencies of government, has proved unusually flexible in many cases, is quite evident by a study of its operation. There are very few important restrictions in the document which would prevent the establishment of almost any kind of educational, social welfare, or state administrative systems that the people might desire. This being the case, the lack of progress in these fields can be charged to the indifference of the people in not forcing legislative action rather than to any rigid or out-of-date provisions in the organic law.

There are, however, many provisions in the constitution which are so rigid and inflexible that no progressive legislation can be enacted validly under them. For example, the tax system and the organization and functions of rural local government are so embedded in the constitutional granite that no fundamental changes can be made until the organic law has been amended. Realization that the backwardness of Tennessee in social and economic development may be the result of certain rigid constitutional restrictions upon governmental action has prompted certain leaders and groups to fight for constitutional reform. As has been indicated, their efforts in every case have been thwarted by the people.

Most frequently, the causes of the failure of constitutional reform have been political in nature. For instance, the proposal for a convention failed in 1897, it was said, because the office-holders of the dominant political party opposed it. Likewise, the Republicans, who were strong in eastern Tennessee, refused to vote for the convention because the resolution authorizing it was regarded as a Democratic measure.[18] Again in 1904, there was serious opposition in the Democratic party to the seven amendments proposed, even though that party sponsored them. Furthermore, office-holders other than the ones affected by the amendments opposed them. At other times, the Republicans raised objections to conventions because the basis of representation in the convention did not conform to their views.[19] There will be little hope for relief from the operation of this cause for failure of reform until the people generally refuse to listen to arguments of those who have a vested interest in government, and until they learn that constitutional reform is neither Democratic nor Republican in character.

It has been charged that some attempts at reform failed because the people were not properly informed, and there is much truth in this contention. More than once, the legislature proposed amendments to the constitution and then failed to appropriate money to defray the cost of advertising them as required by the constitution. The constitutional requirement of publicity for amendments was deemed to have been satisfied by a few inconspicuous notices in the metropolitan dailies six months prior to the election of the members of the second legislature. Occasionally the press gave publicity to the proposal immediately preceding the election at which it was voted upon. If, however, the vote on a convention or an amendment and a general election coincided, personalities and issues of the general campaign overshadowed all questions of constitutional reform. In fairness to all, however, it should be pointed out that in 1917 and 1925 the legislature did provide for the printing and distribution of a few thousand copies of the acts authorizing the proposals of conventions.[20]

A considerable degree of indifference on the part of the people toward issues fundamental to the state government has been responsible for the defeat of some reforms. As shown above, the discrepancy between the votes on constitutional questions and the votes cast for governor is indicative of this characteristic of the electorate. In the election of 1931, newspaper reporters stated that in many counties only a few of the normal precincts were open, and reports from Meigs county showed that no

[18] Caldwell, *op. cit.*, pp. 327–328.

[19] J. L. McWhorter, *Just for Tennessee* (Nashville, 1917), p. 1.

[20] *House Journal*, 1887, p. 153; *Public Acts of Tennessee*, 1917, pp. 585–586; *ibid.*, 1925, Senate Joint Resolution No. 32.

election was being held there at all. In answer to a question as to his negligence in not opening the polls in that county, a member of the election commission was reported to have remarked: "Why spend two hundred dollars on an election when but a dozen or so would vote?" From Maury county came the report that there was as much interest in the constitutional convention as in a last year's copy of a newspaper. A proponent of reform explained this indifference on the ground that "the lavish expenditure of money on behalf of candidates for office in Tennessee has impressed the voters with the idea that there is little at stake where this is not done."[21]

The state is cursed by a sectionalism of the worst sort, which is perpetuated by the constitutional sanction of the three grand divisions of the state, East, Middle, and West Tennessee. Frequently the voters of East Tennessee have feared to favor constitutional reforms lest the legislature, controlled largely by Middle and West Tennessee representatives, acting under the revised instrument, might force legislation unfavorable to their section. This portion of the electorate has felt that it was better to keep the status quo rather than to risk the uncertainties of the future under a new or amended constitution.[22]

As a cause for the failure of the legislature to propose reforms of a fundamental character, there should be mentioned the conservatism of the members of that body. Here is a significant fact: with the possible exception of the proposals for reforming the basis of taxation and for limitation on local indebtedness, the legislature has submitted to the people no amendments dealing with fundamental changes in the organization or functions of government in the state. One could hardly expect any other course of action from a body the majority of whose members consist of representatives from the conservative farmer and lawyer classes. Of the 1,715 persons who served in the legislature from 1911 to 1935, 527 were lawyers and 620 were agriculturists. Of the farmer group, between 70 and 80 per cent came from Middle and West Tennessee, and these represented the large farm-owner and absentee landlord classes—the aristocracy of the agricultural population. Even when the legislature proposed the question of a constitutional convention—a sign of liberalism, perhaps—it was suspected by some individuals that its members were more interested in the personal political consequences of their acts than in promoting progress in government.

Until the recent rise of her four metropolitan communities, Tennessee has been extremely rural, and hence her people have been very conservative in viewpoint. In fact, the rural elements remain very conservative today. Frequently, it has been charged that vested interests have played

[21] Knoxville *News-Sentinel*, Sept. 24, 1931; Nashville *Tennessean*, Sept. 27, 1931.
[22] *Senate Journal*, 1927, pp. 342–344.

upon this conservatism in order to keep the status quo whenever questions of constitutional reform have been raised. In 1917, an apostle of reform, writing of the arguments of his opponents, reminded the people that they should not be misled by the contention that things are well enough as they are. "Conservatism," he declared, "born of vested property rights, gave birth to this opinion. Reactionaries build a pyramid of argument on a pin-point of fact."[23]

In a word, governmental reform in Tennessee in keeping with modern social and economic progress has been thwarted by indifference of the people toward fundamental issues and by a mystical conception of the constitution which views that document as a hallowed work, an end and not a means to an end. The marvel is that the state has done as well as it has under a constitution which differs but little from the document framed in 1834. That there is need for constitutional revision goes without saying. When this need will be met, time alone will disclose.

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[23] Joseph H. Acklen, *Subjects for Consideration* (State Central Committee on Constitutional Convention, Nashville, 1919), p. 22.

The British Party Conference. At a time when democratic processes are being sneered at by opponents from the Left and Right, it is well to reassess the functioning of these processes in the light of present-day conditions. Without taking any liberties with fact, one can say frankly that democracy today is proving very ineffective in coping with many of the problems arising from the present world situation, and from the growing size and complexity of voting populations. To develop and crystallize public opinion, to develop leadership, to develop the proper instrumentalities for converting dominant opinion into governmental action—all of these matters are now of major importance in the democracies of the world, but particularly in the United States.

American political parties have always performed their important functions in a desultory, routine, and inadequate manner. Their organization has existed largely for election purposes and not for the discussion of public policy. As Professor Sait has so well remarked: "We have two parties, not because there are two sides to every question, but because there are two sides to every office, outside and inside." Filling the offices has monopolized the attention of party leaders and party organizations, and the equally important function of formulating public policy has been left pretty much to chance and to last minute compromises which usually mean nothing. In a word, "the portentous fabric of party organization," as Lord Bryce referred to it, has to a considerable degree in the United States failed to function as an agency for formulating public policy and for expressing public issues clearly and concisely in elections so that the sovereign voters may effectively control the direction of governmental policy.

American parties have not properly organized themselves for the discussion of public questions. They have not, with rare exceptions, even tried to develop party machinery which would at once both clear the atmosphere of platitudinous demogoguery and lead to a general agreement on fundamental principles. Undoubtedly the task of getting agreement within a great party in a country so large and complex as the United States is difficult. But also the task is undoubtedly important and vital, and must be dealt with if we are to have efficient party government and a healthy democracy.

That the task of developing proper party machinery for adequate discussion of public questions is not an impossible one is demonstrated by British party experience. Since the World War, and even before, British parties have held regular annual conferences in which delegates and Government ministers discuss the important issues of the day. The

existence of these conferences is generally known,[1] but their importance and significance as agencies for the formulation of public policies and for improving party organization are not so well known. For this reason, therefore, as well as in view of the present Republican move to create a program committee, the experience of our British cousins with party conferences may well be reviewed.

Regardless of their relative strength, and irrespective of whether they are in power or out of power, the three British parties hold annual party conferences for the transaction of important party business. Differences in structure, composition, procedure, and power exist among the various party meetings. But they have several things in common: (a) they discuss public questions and pass resolutions; (b) they do not nominate candidates for public office; (c) they occupy an important place in the party organization; and (d) they make a contribution to the democratic determination of public policy.

In point of power and influence, the Annual Conference of the Labor party comes first. The constitution of the party provides that "the party conference shall decide from time to time what specific proposals of legislative, financial, or administrative reform shall be included in the party program";[2] and further, that "no proposal shall be included in the party program unless it has been adopted by the party conference by a majority of not less than two-thirds of the votes recorded on a card vote." The constitution also provides that "the work of the party shall be under the direction and control of the party conference, which shall itself be subject to the constitution and standing orders of the party. The party conference shall meet regularly once in every year and also at such other times as it may be convened by the National Executive Committee." Provisions are made for the number of delegates and also for their election, and the requirement is made that "every delegate must individually accept and conform to the constitution, programme, principles, and policy of the party." The National Executive Committee, which is the "administrative authority of the party," is elected by the party conference and is subject to its control and direction, and must render to the conference a report of work and a financial statement. Thus the party conference in the case of the Labor party is the supreme authority within the party.

[1] See brief mention of this topic in F. A. Ogg, *English Government and Politics* (2nd ed., New York, 1936), pp. 581–587; E. P. Chase and others, *Democratic Governments in Europe* (New York, 1935), pp. 105–107. See also the author's "British Party Organization," in *Political Science Quarterly*, Vol. 45, pp. 161–181.

[2] *The Constitution and Standing Orders of the Labour Party*, as amended by the Annual Party Conference (Bournemouth, 1937). The relevant clauses of the constitution are V, VI, VII, and VIII, and the standing orders, numbers 1, 2, 3, 4, 5, and 6.

In 1937, 705 delegates attended the Labor party Annual Conference and represented a party membership of slightly over 2,000,000.[3] In the post-war years, the size of the conference has varied from 1,100 delegates to 600. A full account of the proceedings is kept, and ample opportunity is given for discussion of all questions submitted in advance by any affiliated organization. Voting is by cards, with the trade union delegates having one vote for each 1,000 members, and the federations and central labor parties having one vote apiece, bringing the total votes to about 2,500,000. The members of the National Executive Committee are called upon to present issues and to defend their actions. The leader of the party is in attendance, takes an active part in the deliberations, and is affected by the decisions. If a program is approved, as was the case in 1937, it is binding on the officers and members of the party, and constitutes the program toward which the party must work. In the conferences, genuine differences of opinion appear and are aired, and usually settled. In the 1936 and 1937 conferences, for instance, the constituency parties rebelled against the Executive and the trade union leaders who supported it, and were able to secure a change in the party constitution which gives them more representation.

As one surveys the Labor party conferences, especially if he has been in attendance at several of them, he cannot fail to admire their democratic quality, their genuine discussions, their representative flavor. They have frequently been involved in perplexities. They are occasionally quite bitter. But they have in the long run been representative of the party, and they have produced a series of party programs which would do credit to any party organization in the world. Running over the various programs which they have evolved out of their discussions, we find *Labour and the New Social Order*, *War Aims*, *Labour and the Nation*, *For Socialism and Peace*, and this year *Labour's Immediate Program*. Unlike other minority parties in another great democracy, they were not afraid to bring their differences out into the open, and they were not derelict in the development of programs which became the basis of their appeals to the electorate.

Somewhat in contrast to the Labor party conference is the Annual Conference of the National Union of Conservative and Unionist Associations. By its constitution, "the regulation and control of the affairs of the National Union shall be vested in a Conference" consisting of party officials, office-holders, and representatives from the constituency associations and affiliated organizations.[4] The number of delegates in attendance varies

[3] *Report, Annual Conference of the Labour Party*, 1937, p. 280. This is the largest individual paid membership of any political party in the democratic world. In the dictatorship countries, party membership is larger.

[4] *The Constitution and Rules of the National Union of Conservative and Unionist Associations*, Arts. XIV, XV, XVI, and XVII.

from 1,300 to 2,000, depending upon the importance of the business before the conference and the presence or absence of the leaders of the party. Lord Baldwin missed but one party conference in the fifteen years of his leadership. Ordinarily, several ministers are present when the party is in power; in 1937, eight were in attendance and took part in the discussions. The party leader always addresses a mass meeting but has a spokesman to attend the business sessions. A series of resolutions is always passed after more or less thorough discussion. The voting is usually by acclamation or show of hands, and due to the stronger independent position of the party leadership, the discussions and decisions on policy are inclined to be less critical of the party leaders. But refreshing and informative debates occur, and, as will be noted later, resolutions are occasionally passed which affect public policy. Even though Conservative annual conferences are more valuable as party get-togethers than as formulators of party policy, no one can accuse them of being as bootless and sterile in this respect as American party conventions. They provide an opportunity for serious discussion of public questions. They give the constituency parties a chance to bring up questions of organization and program, and they bring the leaders into contact with the rank and file of the party.

The present position of the Liberal party renders a discussion of its deliberative machinery somewhat less significant. Nevertheless, as with the two other parties, the Liberals have provided for an annual meeting, now called an Assembly, which under the constitution and rules of the National Liberal Federation, meets annually to discuss party problems and policies. This meeting occurs now in May instead of in October, as is the case with the other two parties. It is "open for the free discussion of any matter affecting the policy and principles of the Liberal party," and it may "give expression by resolution to the opinions of the Liberal party upon such questions as are by general consent deemed to be of the first importance." A thousand to twelve hundred delegates from the local associations and the party organization are usually in attendance, and illuminating discussions are had. The party officials and leaders take an active part in the discussions, and resolutions are always passed which place the party on record. As with the conferences of the other parties, time is also devoted to deliberating about the problems of the party organization, such as membership, finance, and propaganda.

The annual party conferences herein described are the most important meetings of the party members for the discussion of party policy. They are not, however, the only ones at which policies are discussed or resolutions passed. There are, in addition, regular meetings of smaller bodies representative of the parties, at which time resolutions are also passed. The Council of the Liberal party organization meets usually in December

and engages in lively discussions.[5] The Central Council of the Conservative party similarly meets at least once during the period between annual conferences, usually in March, and transacts a considerable amount of party business, including the passing of important resolutions.[6] The National Executive Committee of the Labor party meets at least twice a month to make the important decisions for the party.[7] British parties, therefore, are not lacking in opportunities for the discussion of public questions. Once a year their members assemble in party conference. Between annual conferences, smaller councils come together, and there are also summer schools and other educational activities.[8] In other words, expression rather than suppression of opinions is encouraged, and such expressions of opinion are not the mere vaporings of party officials, but frequently eventuate in resolutions which give concrete expression to party feeling.

But are these discussions and resolutions of any real value in determining governmental policy? The answer is yes and no. Britain has a cabinet system of government, and it is not possible for responsibility to pass completely from the House of Commons to a party conference. But in the case of the Labor party under the report adopted at the Hastings conference in 1933, a special conference of the party would be summoned "in the event of a general election affording the party an opportunity of taking office as a minority government," and "a full meeting of the parliamentary party would be held to receive and consider the recommendations of the special conference."[9] In this case, even the taking over of the reins of government becomes a matter of consultation with a special party conference. Furthermore, in a case where the party might form a majority government, as well as in the case above referred to

[5] See *The Times*, December 17, 1936, for a report of a recent meeting of the Council.

[6] At the meeting on March 24, 1937, for instance, the Central Council passed five resolutions on the following subjects: (1) reaffirming faith in conservative principles; (2) warm approval of the rearmament program; (3) full support of the Government's policy of voluntary army recruitment; (4) congratulating the Government on its traffic measures; and (5) urging that borough council elections be scheduled at a better time of the year and that the polling hours be extended. Two other resolutions dealing with ex-service men and milk regulations were withdrawn. *The Times*, March 24, 1937, p. 8d. See also *Report of the Sixty-Third Annual Conference*, 1936, pp. 30–35, and *ibid.*, 1937, pp. 32–37, for reports of the Council and its Executive Committee.

[7] In 1937, the Executive had 32 sessions. See *Report, Annual Conference of the Labour Party*, 1937, p. 72.

[8] See the interesting studies by Professor Joseph R. Starr of Labor and Liberal activities of this nature in this REVIEW, Vol. 30, pp. 956–974 (Oct., 1936), and Vol. 31, pp. 703–719 (Aug., 1937).

[9] *Report, Annual Conference of the Labour Party*, 1933, pp. 8–11, 166–168.

where it is a minority government, the report of 1933 requires any Labor Government to follow the policy "laid down in resolutions of the annual conference and embodied in the general election manifesto. The King's Speech would, from year to year, announce the installments of the party's policy with which the Government proposed to deal. Where questions arise for decision on which party policy has not been declared, they would be dealt with by discussion with the appropriate bodies." This means not only that the party conference states the party's position by means of resolutions and occasionally by a complete program, but that it also requires these party determinations to be taken up by a Labor Government and given governmental effect. One could not ask for a more democratic party government than this, nor can one find any better example of translating party resolves into governmental policies.

But perhaps the determination of Labor party policy is not itself in the hands of the rank and file of the party. Perhaps the National Executive dominates the party conference so completely that the delegates are without effective power. On occasions, one can get this impression. But on the whole, a Labor party conference, although it almost always responds favorably to the suggestions of its administrative committee, is not usually controlled by any leader or group of leaders. In a Conservative party conference, on the other hand, leadership counts for everything. At the Labor party conference of 1937 in Bournemouth, where the party was able to deal satisfactorily with a serious problem of representation within the party, and where it approved *Labour's Immediate Program*, its latest party pronouncement, the Executive by no means dominated the conference. The delegates representing the rank and file of the Labor movement voted resolutions up or down quite without regard to the mover of the resolution or the source of the idea. There was, and always is, free and frank discussion. It is true, of course, that Labor has not had much time in government office, and what will happen when a Labor prime minister, with all the prestige which that office carries, and Labor cabinet ministers, come down to party conferences and lead discussions can only be conjectured. In 1929 and 1930, when Labor was in power, cabinet ministers faced a barrage of questions at the party conferences, and even so venerated a leader as Arthur Henderson did not escape without an hour of searching questioning. My guess is, therefore, that the Labor party conferences will continue to be quite as insistent upon controlling their deliberations as they have been up to the present. In any case, they have always been extraordinarily good forums for the discussion of party policies, and one hears more real debate on serious issues in one hour at a Labor party conference than in a whole Democratic or Republican national convention.

The Conservative party conference requires a different evaluation.

The size of a Conservative conference militates against having the kind of real debate one hears in a Labor conference. The constitution of the National Union, furthermore, does not give to the conference a preëminent position in the party. The strength of the party organization is such that one cannot conceive of a Conservative party conference running very far away from its leadership. In fact, leadership counts for nearly everything at the annual conference.

This is not to say that the Conservative conference is mere window-dressing. For, in truth, the conference has great value to the party by way of improving its organization, its morale, and its unity. And what is just as important, it affords an adequate opportunity for a real discussion of public questions. A perusal of the resolutions adopted or withdrawn at a Conservative conference should be sufficient to demonstrate the breadth of the discussion, its genuineness, and its value as a contribution to the formation of democratic policy. This does not mean that these discussions and resolves necessarily control a Conservative Government, although, as will be indicated, they well may do so. But it does mean that Conservative conferences usually tender the party leadership, which since the war has usually meant the Government, a rather comprehensive budget of advice, some of which may be quite unpalatable. In the midst of resolutions "approving" and "congratulating" and "supporting" the Government, one occasionally finds a resolution like the one passed at the Margate conference of 1936. This resolution moved by a Conservative M.P., dealing with the question of the return of the German colonies, gave warning to the Government that the party would not stand for a yielding up of British rights. The words are interesting: "Resolved, that this conference urges His Majesty's Government, in order to dispel grave anxieties within the Empire and dangerous hopes abroad, to give an assurance that the declaration made by the then Foreign Secretary, Sir John Simon, to the German Chancellor in Berlin in March, 1935, to the effect that the cession of any British Mandated Territory was not a discussable question, still represents the unaltered attitude of His Majesty's Government."[10]

Conservative conferences generally support their leadership strongly but not uncritically. As *The Times* remarked about the Margate conference, "some resolutions have been passed which in timing rather than in substance have plainly disregarded official advice."[11] And whether or not the advice tendered by the conference is followed by the Government, the Government at least cannot offer as an excuse for some misguided action that it did not know the party will in the matter. In another respect, too, we find the conference useful in both a party and a governmental sense,

[10] *Report of the Sixty-Third Annual Conference*, 1936, p. 22. Also *The Times*, October 2, 1936, p. 8a.

[11] *The Times*, October 3, 1936, p. 13b.

in that it permits Conservative M.P's., who are quite swallowed up in the large House of Commons and rather effectively prevented from raising objections to the Government program or tendering advice, to raise important policies and discuss them. Ministers who expect and receive criticism from the Opposition in the House of Commons occasionally receive effective criticism of their policies at a Conservative conference. The hail of criticism which greeted Mr. Ramsbotham, the minister of pensions, at the Scarborough conference in 1937 is a case in point.

Finally, it is interesting to note that conference resolutions are not merely passed and printed in the newspapers. In the words of the Central Council of the party, "the several resolutions on questions of policy passed at the annual conference at Bournemouth were duly brought to the notice of the leader of the party, and the subject-matter of several of them, notably those on national and imperial defense, foreign policy, the needs of the special areas, and agriculture, were then engaging the attention of the Government."[12] Or, in the words of the 1937 report, "all resolutions on questions of policy passed at the annual conference at Margate, at the meetings of the Council referred to, and by provincial areas and other organizations of the party, have been forwarded, in several cases with the endorsement of the committee, to the leader of the party and to the ministers of the government departments respectively concerned. In all cases where detailed replies or observations have been received from ministers, copies of them have been sent to those from whom the resolutions were received."[13] Thus the opinion of the party does not evaporate into the atmosphere of the conference—it is carried to the leaders (in this case, the Government), and it receives their careful consideration. In sum, a *Times* editorial states the matter succinctly and accurately. "Party resolutions in this country," it says, "are not dictated, neither are they decisive, and the degree in which effect is given to them depends, with the knowledge and assent of those who frame and pass them, upon how far they are considered wise and practicable by those who form the Government of the country. Moreover, resolutions must be judged according as they reflect a general discontent or a spirit of exhortation upon specific points."[14] The Conservatives have never used the annual conference to formulate a complete party program or to develop election manifestos. The party leadership through the Central Office decides what issues will be stressed in an election campaign.

The anomalous position of the Liberals in the post-war years has made it very difficult for them to keep the party machinery running. But they have always had their annual conferences, and their council and other committee meetings in between; and since they have not had government

[12] *Report of the Sixty-Third Annual Conference*, 1936, p. 30.
[13] *Ibid.*, 1937, p. 32. [14] *The Times*, October 3, 1936, p. 13b.

responsibility, most of their effort has been given to the formulation of issues with which to attack the party in power. Nevertheless, this activity is very important in a democratic state, for it helps to inform and to crystallize public opinion along constructive and responsible lines. The annual conference of the Liberals, when added to their interesting and valuable Summer School at Cambridge University, is not, therefore, without influence or value.

This review of British party practice with reference to policy formation brings into bold relief the sad and hopeless position in which American parties find themselves in this particular. While British parties have developed regular means for discussing and formulating party policy, and even for driving this opinion through to the statute-books, American parties are still floundering in a sea of patronage without much interest in the improvement of their party processes. Whereas British parties find it useful to hold party conferences once a year, American parties do a lot of worrying about holding a conference once in four years, and then see to it that distressingly inadequate time and attention are given to the discussion and formulation of a platform. On the one hand, British party leaders and British ministers need not be in the dark about what their parties desire in a given situation, and they even find it helpful, indeed necessary, to maintain their contacts with the various agencies of party discussion. On the other hand, American party leaders go their own path, not bothering to consult with the rank and file of the party because no organization exists for the purpose, and doing nothing to improve the party machinery so that this void may be filled. The chairman of the National Committee speaks for himself, and the only responsible leadership which exists is in Congress, and it is a sort of leadership by seniority, not by any plan of party responsibility. Whereas in Britain differences between the party leadership and the rank and file are either liquidated or the leadership changed, the party thus presenting a reasonably united and disciplined front, in the United States many leaders in the same party have diametrically opposed views; and these may or may not correspond to a generally held party opinion, for that opinion is seldom coherent or even formulated in concrete terms. In Britain, parties, after adequate discussion, formulate their opinions and then allow reasonable discretion to their leaders in giving them governmental effect. In the United States, the quadrennial platform is not taken seriously and the party leader has to reach out into blank space to pull out an issue, and that issue thereafter becomes a party issue for all political purposes. In Britain, considerable value attaches in all of the parties to the preliminary discussion and preparation, in the various constituency associations, of the resolutions which are finally brought before the party conference. Resolutions come up from the grass roots and arise because of opinions

which are developed in the local branches of the parties. They are not merely thrown into a party conference in an innocuous form by the party leadership. This is not to say that resolutions are not carefully sifted or framed by the party leadership. But it does mean that discussions in British party conferences are not limited, as in American party conventions, to the platitudinous proposals of a resolutions committee. Allowing for differences in the form of government, it is submitted that no form of government can excuse the deep void in the American party system which does not provide for real policy discussions, and which encourages irresponsibility, divided leadership, poor discipline, and undemocratic control.

A rather concrete comparison between the Labor party in Great Britain and the Republican party in the United States is illustrative of the value of British party processes as opposed to the handicaps under which American parties suffer. The British Labor party has been in the doldrums for six years. It met two devastating defeats in the general elections of 1931 and 1935. It lost its old leaders and it had to reconsider its whole *Weltanschauung*. Similarly, the Republican party, following the loss of the congressional elections in 1930, was dealt two smashing blows in 1932 and 1936; and although it constitutes, in Senator Vandenberg's confident phrase, "the greatest minority party in history," it is divided, discordant, and apathetic.

How have these two parties gone about regaining their respective former positions? The answer points the moral of this inquiry. The Labor party began at once to utilize the party agencies at its disposal,[15] and over a period of six years, culminating in the outstanding conference at Bournemouth in 1937, it has been able to develop a complete, newly oriented party program, rehabilitate its party organization, restore discipline, extend its activities into the local field, and lay the foundations for a successful campaign in the next election. Then, having discussed, formulated, and approved in annual party conferences a party program which the Laborites refer to as "Labour's Immediate Program," they took the program to the country by arranging a number of regional

[15] An interesting move was to create a Distressed Areas Commission composed of able party members. The commission first held representative delegate conferences in each of the areas to explain the scope of the work and to secure the coöperation of the local Labor movement. The second step was the preparation of written evidence by the local Labor movements. The third step consisted of visits and investigations in the areas by the commission. The fourth step was the preparation and publication of a series of very able reports. "Altogether this has proved to be," in the words of the annual report of the party, "one of the most striking and successful projects undertaken by the party." *Report, Annual Conference of the Labour Party*, 1937, pp. 18–20. See also Dr. Maddox' interesting article on "Advisory Policy Committees for British Parties," in *Political Science Quarterly*, Vol. 49, p. 267.

conferences, twenty-two in number, to which all members of the party were invited, including members of Parliament, parliamentary candidates, party agents, officials of local party organizations, and members of affiliated groups.[16] Two speakers attended each conference, one to deal with the program and one with the organization of the campaign. In a word, the Labor party, with a far more difficult opponent, and without nearly as large a traditional following as the Republican party in the United States, has cleared its decks for united, intelligent, and responsible party action.

In the United States, the Republican party, due to Mr. Hoover's urging, has finally started an effort which may be helpful. The tremendous obstacles that had to be overcome, however, in order to get this program under way, and the stand-offish attitude with which the proposal is greeted by so many of the party big-wigs, indicate how discouraging it is in the United States to attempt something constructive in the way of party improvement. For five years, the party leadership did little more than keep open the offices of the National Committee. They did not promote party discussion. They did not encourage party conferences. They talked mostly of organizing the party, but judged by the results of 1936 it might have been better if they had done nothing along this line and let nature take its course. Many millions of dollars would have been saved for more useful purposes. The resolutions committee at the Cleveland convention entered upon its work without preliminary research and turned out a platform which was all things to all people. No adequate discussion of the platform took place, and the party floundered through the campaign without knowing its own mind on the important problems of the day. Even today, on the eve of congressional elections, it has not yet formulated a program which can be offered to the country as an alternative to the New Deal.

It seems true that Americans, in general, base their franchises on dislikes rather than on faith. They have, to date at least, preferred to wait for the opponent to make mistakes, rather than themselves to formulate an alternative program to present to the people. Ex-Governor Smith pointed this out in his post-election statement in 1928. Ex-President Hoover pleads the point now. Perhaps one more American may now add the thought, based on the foregoing review of British party experience, that a bankrupt, defeated, discordant party need not remain in that

[16] This interesting program, in the words of Hugh Dalton, "is a deliberate study in priorities" which "represents a big constructive job of work." The program has been issued in pamphlet form and may be found in the *Report* for 1937, Appendix X, pp. 277–279. It is a clear, concise program, for, as the chairman of the 1937 conference (Mr. Dalton) said, "we have no use at this time of day for rhetoric without research, nor platitudes without precision."

condition if only it will develop the machinery and organization for adequate party discussion, if only it will patiently work toward the formulation of a sound, considered program which accurately represents the reasonable hopes and aspirations of the rank and file of the party, and always if it possesses the ability in its ranks to vitalize such a program.

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A Step Toward *Reichsreform* in Germany. The problem of *Reichsreform*, or of the organic political, administrative, and territorial reorganization of Germany, which was considered an urgent task ten years ago and at that time led to an assembly of Reich and Länder ministers called the *Länderkonferenz*, was partially recalled from oblivion by some recent legal enactments. Because of the changed political circumstances, the setting, as well as the aim, of such reform is naturally quite different now from what it then was.

The chief aim of the work of the *Länderkonferenz* and its subcommittees between 1928 and 1930 was to stop the increasing centralization of governmental functions in the hands of the Reich by delimiting more precisely the respective jurisdictions and strengthening at least the administrative functions of the Länder, since their legislative powers had been so severely curbed by the Weimar constitution of 1919 and its subsequent interpretation. The main obstacle to the achievement of that aim was generally seen in the heterogeneity of the then 18 constituent parts of the Reich. That variance in size, population, wealth, and internal organization was obviously an impediment to the administrative capacity of the several Länder, and had furnished the authorities of the Reich with an excuse for their policy, in the 1920's, of withholding and withdrawing ever more administrative functions from the Länder. Such a policy was defended on the ground that the inability, especially of the smallest Länder, adequately to fulfill those functions made centralization necessary in the interest of a smooth and efficient administrative process. However, the recommendations which the *Länderkonferenz* submitted as remedies in 1930, and which involved amending the constitution, were never carried out, since it appeared impossible to obtain the necessary parliamentary majorities against the combined forces of tradition and opportunism.

The National-Socialist régime displayed no haste in resuming the task of *Reichsreform* which its politically hampered predecessors had been incapable of accomplishing; it even prohibited any discussion of the problem. In the sphere of local government, it consolidated the former multi-

plicity of municipal law by enacting a uniform Municipal Code,[1] but no similarly uniform measures were taken to reform government on the intermediate level, i.e., in the sphere of action of the former Länder. Rather, the transfer of all political power from the Länder to the Reich[2] and the establishment of Reich governors (*Reichsstatthalter*)[3] were considered sufficient to serve the immediate end of securing the amount of centralization necessary to sustain the new régime. Its slowness to embark upon other aspects of reform may have been a sign of the party's anxiety to avoid, for some time at least, a matter likely to arouse strong opposition both from people defending century-old loyalties and from individuals unwilling to relinquish newly acquired positions of prestige at the head of Prussia and other former Länder. Or again it may have been an indication of a belief that the withdrawal of all powers from the Länder had rendered the question of a territorial recasting of the Reich decidedly less urgent.

This attitude seems about to be abandoned now, for recently Hamburg, which under the constitution of 1919 enjoyed the status of a Land,[4] was singled out for reorganization. The boundaries of that city-state had been a constant cause of complaint. The peculiar interspersion of the territories of Prussia and Hamburg along the lower course of the river Elbe not only had created the most awkward situations for the population concerned—some villages, for example, stood partly on Prussian, partly on Hamburg, soil—but had especially interfered with the adequate development of the harbor of Hamburg as the main gateway of German ocean transport. The confusion had finally been relieved by an agreement between the two Länder, negotiated in 1928–29, which created a joint harbor authority "as if" no boundaries existed. In the matter of ceding the needed territory to Hamburg, however, Prussia had remained adamant, because even the slightest expansion of any of the smaller Länder was incompatible with the unitarist beliefs of her leading statesmen.

The preliminary step in the reorganization of Hamburg was an alteration of the map around the mouth of the Elbe. By cabinet decree of January 26, 1937,[5] Hamburg's area was rounded out by the addition of

[1] Dated January 30, 1935. *RGBl* (*Reichsgesetzblatt*), Pt. I, p. 49. For an analysis of the Municipal Code, see article by Roger H. Wells in the August, 1935, issue of this REVIEW. [2] By law of January 30, 1934 (*RGBl.*, I, p. 75).

[3] By laws of April 7, 1933 (*RGBl.*, I, p. 173) and January 30, 1935 (*RGBl.*, I, p. 65).

[4] The total population of the state was 1,200,000, of which 1,110,000 lived in the city itself, while the remaining 90,000 was divided among three towns and 23 rural communities. The city covered one-third of the state's total area of 415 sq. km. Cf. Cuno Horkenbach, *Handbuch der Reichs- und Staatsbehörden, 1935–36*, p. 106.

[5] *RGBl.*, I, p. 91. The same statute also decreed the merger of Lübeck in Prussia and the exchange of territory between Prussia and Oldenburg and between Prussia and Mecklenburg.

30-odd Prussian towns and villages, Prussia receiving in return seven Hamburg communities. Altogether, 50 communities were amalgamated with the city proper into the new "*Hansestadt Hamburg*" with a total population of 1,675,000. On December 9, 1937, a further law[6] completed the reform by giving the new city a constitution which, on April 1, 1938, replaced Hamburg's constitution of 1921.

Under the new constitutional statute, Hamburg is to be an administrative district of the Reich and at the same time a municipality (sec. 1, par. 1),[7] thus retaining its traditional city-state character, "adapted, of course, to the requirements of the National-Socialist Reich," as the party's official newspaper added in commenting upon the law.[8] Accordingly, the *Hansestadt Hamburg* will have a dual, i.e., a "state"[9] and a "municipal," administration (sec.1, par.2). The state administration, whose internal organization is as yet to be determined, will be exercised by the Reich (sec.3, par.1), through Reich officials headed by the governor (sec.1, par.3). Like the governors in the other former Länder and the *Oberpräsidenten* in the Prussian provinces, he will act under orders from the Reich ministers and be answerable to them (sec.3, par.2). The municipal administration likewise is to be in his hands (sec.6, par.1), so that his duties will be threefold, combining those stipulated for all governors by the law of January 30, 1935, with those under the new statute as head of Hamburg's state and municipal administrations.

To have a joint head for its state and city administrations is nothing novel for Hamburg. In Article 67 of its 1921 constitution, it was provided that *Bürgerschaft* and *Senat*, respectively the legislative and executive organs of the state, should also direct Hamburg's municipal affairs. What is new is that now a Reich official, imposed from outside, is to head both administrations, whereas formerly the mayor, who was placed there by action of the city-state's own organs, held that highest office. Under the new regulation, the mayor is merely the governor's deputy in municipal affairs (sec. 6, par. 2), while the highest leadership of the city—although assigned as a rule to the mayor under sec. 6 of the Municipal Code of 1935—rests with the representative of the Reich. This is not simply a

[6] *RGBl.*, I, p. 1327.

[7] The statute calls it an "*Einheitsgemeinde.*" It is to incorporate all those 50—formerly municipally independent—small communities, together with Hamburg proper, into one municipal body under one central municipal administration.

[8] *Völkischer Beobachter* (*Süddeutsche Ausgabe*), December 10, 1937.

[9] "State" is here used as distinguished from "municipal." With Germany now a unitary state, the terms "federal" and "state" cannot any longer be used as referring to the Reich and the Länder, respectively. However, a great deal of the old official terminology, reminiscent of the former status of the Länder, still prevails. Cf. Erich Becker, "Die Rechtsstellung der deutschen Länder in der Gegenwart," *Zeitschrift für die gesamte Staatswissenschaft*, 97 (1937), pp. 462–498.

matter of personalities;[10] rather, it indicates the change in Hamburg's status from a quasi-autonomous Land to a province of the Reich. Similar proposals were made within and without the *Länderkonferenz* ten years ago.

Two other innovations appear in the new statute. In the interest of administrative consolidation, the *Länderkonferenz* recommended combining under one head the separate administrative organs which the Reich, since 1919, had built up for special matters such as finance, labor, and veterans' care. Sec. 2, par. 3, of the new statute follows up this suggestion by authorizing the Reich minister of the interior, with the consent of the ministers concerned, to transfer to the Hamburg state administration functions out of that special group. No real gain for administrative reform can be seen in the measure, however, as long as such transfers are possible only in one portion rather than the entire Reich so that the complete abolition of the special administrations might result.

The second recommendation of 1930 that can be found in the new statute is the so-called *Auftragsverwaltung*, offered by the *Länderkonferenz* as a means of further strengthening the administrative capacity of the Länder by delegating to them the actual administration in certain fields which in principle would remain within the jurisdiction of the Reich. Par. 4 of sec. 2 of the new law makes possible such delegation from state to municipal administrative organs. Valuable though such a provision could be for communal self-rule, its significance in the present case is diminished because of the personal union linking the two administrations, for the governor will still be a Reich official even when formally acting in the city's name.

The apportionment of functions between the two jurisdictions is concerned only with administrative tasks. Legislative authority is expressly withheld[11] from Hamburg in sec. 4, par. 1, of the statute. Vested in the governor are ordinance powers of undefined scope which can be exercised only with the consent of the superior Reich ministers (sec. 4, par. 1).

Under the 1921 constitution, certain functions were administered jointly by the state and city of Hamburg. It is, therefore, of interest to notice which of these the new constitutional statute classifies as central and which as local. Here again can be seen the influence of the *Länderkonferenz*, which recommended the nationalizing of judicial administration, supervision of municipalities, police, factory inspection, matters of school and church, and the administration of waterways (exempting the South,

[10] Even if the mayor were highest, it would make little practical difference so long as both he and the governor owed their appointment to the same central Reich authorities.

[11] In Art. 6, the law on governors, of January 30, 1935, still spoke of legislation of the former Länder.

however, as a compromise with Bavarian particularism). Save for the first two (already Reich matters under the law of December 5, 1934,[12] and the Municipal Code of 1935, respectively), the above tasks are now to be found among the enumerated fields of state administration (sec. 2, par. 1). Also included are the maintenance of certain administrative tribunals, agricultural measures, and the inspection of banking and of sanitary and veterinary affairs. For the cost of having those fields administered by Reich organs, Hamburg has to reimburse the Reich out of its share of tax returns which the latter transfers to the former Länder.

To the jurisdiction of municipal administration the statute in sec. 5 summarily allots those tasks "which are not included in the state administration." But even of these, it seems,[13] some may be designated by the Reich as *Auftragsverwaltung*, thereby still further diminishing the extent to which the city may act in its own name rather than in that of the Reich—if such a distinction has any political significance in Germany today. As to the structure of the municipal administration, the Municipal Code applies except where modified by the new statute (sec. 7). In other words, the approved scheme of (1) mayor, (2) party delegate with whom he has to collaborate, and (3) counselors (*Ratsherren*)[14] whose advice may guide, but need not determine, his actions, is valid for Hamburg also. The only modification is that the mayor is not the highest municipal officer, solely responsible for the city's administration, but ranks second in command to the governor.

Despite the inclusion of a few organizational suggestions of the *Länderkonferenz*, the new statute is far from realizing the perfect "organization of the intermediate unit" which that assembly had hoped to design. The divergency of fundamental concepts would preclude that. In 1930, the problem had been a political one, viz., to concede, in a democracy, the largest possible degree of decentralization to the Länder and communities without injuring the unity of the Reich. In 1937, the rulers of the authoritarian state faced the simpler, organizational task of so reallocating administrative functions in the Reich's subdivisions as to secure a smooth working of the administration of the centralized Reich.

The provisions of the new constitutional statute plus those of the Municipal Code leave little room for any degree of decentralization whereby Hamburg could administer in some essential fields without instructions from above but merely subject to law and subsequent judicial review. The hierarchy, consisting of the governor (who is the *Gauleiter* of the party), the party delegate (to which position the law[15] assigns the

[12] *RGBl.*, I, p. 1214.

[13] The wording of the statute is not clear on this point.

[14] The *Ratsherren*, supposedly replacing the former municipal legislature, are to represent the various interests among the citizenry.

[15] Ordinance of March 26, 1935 (*RGBl.*, I, p. 470).

Kreisleiter of the party), and the mayor (put in office upon proposal of the party delegate) would be a sufficient guarantee against any measures not acceptable to the central authorities of the National-Socialist state, even if the 45 *Ratsherren* were a body of true representatives of the population and not merely individual advisers, hand-picked by the party delegate and the mayor.

As it is, there is no participation of the people in the determination of Hamburg's municipal policies, for the *Ratsherren* may do no more than state their views to the mayor, who then acts as his conscience, or some higher-up in the party, may dictate. Neither is any provision made for popular control of the city's administration or purse. That power is in principle vested in the state and exercised by the Reichminister of the interior and partly by the party delegate. Under these circumstances, it is hard to discover the local self-government which the Municipal Code was said to confer.

In view of this centralization of power and denial of self-government, the new constitutional statute for Hamburg may well be considered typical of the administrative reforms yet to be undertaken by the National-Socialist state, even though certain provisions, conditioned by the dual nature of Hamburg's status, may not be incorporated into future reform measures.

GERHARD KREBS.

University of California.

NEWS AND NOTES

PERSONAL AND MISCELLANEOUS

Compiled by the Managing Editor

Dr. Charles Kettleborough, for many years director of the Indiana state legislative bureau, died in Indianapolis early in April as a result of injuries sustained in an automobile accident.

Professor Earl W. Crecraft, of the University of Akron, has been appointed dean of the college of liberal arts and professor of political science at Kent State University (Ohio).

Professor David W. Knepper, of the Mississippi State College for Women, will serve as visiting professor of political science at George Peabody College for Teachers (Nashville, Tennessee) during the coming summer session. Professor Knepper has also been appointed a member of the personnel advisory committee of the Mississippi Unemployment Compensation Commission.

At Syracuse University, Professor Finla G. Crawford has been appointed dean of the college of liberal arts in succession to Dr. Karl C. Leebrick, who resigned to accept the presidency of Kent State University (Ohio).

Professor Harold H. Sprout, of Princeton University, will offer courses on world politics and American foreign policy at the University of Pennsylvania during the coming summer.

Professor Frank G. Bates, of Indiana University, has been appointed a member of the recently created Indiana Tax Study Commission. Professor Pressly S. Sikes has been designated as service coördinator by the Commission, and has been given leave of absence by the University to direct a study of the taxation system of the state. Meanwhile, Mr. John Stoner has been in charge of Professor Sikes' courses.

Dr. Charles Fairman, Brandeis fellow in the Harvard Law School, has been appointed associate professor of political science at Stanford University. He has been giving courses in public law at Stanford during the winter and spring quarters.

Dr. Philip W. Buck has been promoted to an associate professorship at Stanford University.

Professor F. S. E. Amos, of the University of Oklahoma, will be on leave during the year 1938–39 and his work will be in charge of Dr. Fritz Ermarth, who recently returned from a tour of the Far East.

Dr. J. Mark Jacobson, formerly an instructor at the University of Wisconsin, and more recently with the National Labor Relations Board, died at his home in Washington on March 26.

By courtesy of Mr. John H. Humphreys, secretary of the Proportional Representation Society in London, a copy of an address by Sir Charles G. Robertson entitled "The Future of Parliamentary Democracy" was mailed in April to each member of the American Political Science Association.

While on the staff of the Institute for Advanced Study to complete a monograph entitled "Brandeis and the Democratic Process—A Case Study of the Massachusetts Savings Bank Insurance Plan," Professor Alpheus T. Mason has had leave of absence from Princeton University, and the lectures in his course on European government have been given by Professor Arnold J. Zurcher, of New York University.

Dean Charles W. Pipkin, of Louisiana State University, officially represented the American Political Science Association at conferences on higher education, combined with the dedication of new buildings, at the University on April 6–8.

During the last week of March, Dr. Herman Finer delivered three lectures on the Edward Douglas White Foundation at the Louisiana State University.

The Kirby lectures at Lafayette College were delivered by Professor Charles H. McIlwain, of Harvard University, during March and April. Subjects discussed included "Our Constitutional System Before the Bar of History," "Judicial Review," and "Checks and Balances in Government.

Messrs. Andrew E. Nuquist and Eldon L. Johnson, who will complete their graduate work at the University of Wisconsin during the summer, have been appointed, respectively, instructor in political science at the University of Vermont and assistant professor of political science at Beloit College.

The tenth annual session of the Institute of Government at the University of Southern California was held at Los Angeles June 13–17. The conference was organized in some thirty-five sections.

The twelfth annual session of the Institute of Public Affairs at the University of Virginia will be held at Charlottesville July 3–16.

The forty-second annual meeting of the American Academy of Political and Social Science, held at Philadelphia April 1–2, was devoted to the

general subject of "Present International Tensions," with sessions on the doctrine of self-sufficiency, trade barriers, population pressure, propaganda, and the position of the United States.

The first annual conference on local government of Oklahoma was held at the University of Oklahoma on March 8–9, under the auspices of the School of Citizenship and Public Affairs. The program was built around county-municipal-state coöperation, especially as to problems that arise on the municipality fringes. Professor Lane W. Lancaster, of the University of Nebraska, and Dr. Kenneth Warner, state personnel director of Arkansas, were the featured speakers. Five hundred persons attended the various sessions, including sixty state, city, and county officers. An institute of international relations was held also at Oklahoma, June 9–18, with Messrs. W. Arnold Forster, Ramon Beteta, Grover Clark, and T. Takeuchi among the speakers and round-table leaders.

A program for the training of archivists, open to candidates for the doctorate, will be offered next fall by the Faculty of Political Science of Columbia University in coöperation with the National Archives at Washington. Students will be expected to take a course on Archives and Historical Manuscripts, to be given in the department of history at Columbia by Dr. Solon J. Buck, director of publications in the National Archives, and to select their other courses in consultation with him. They will also be expected, in addition to fulfilling all the usual requirements for the degree, to take advantage of the opportunities offered to a limited number of suitably prepared students for advanced study of archival problems and archival administration at the National Archives.

The spring meeting of the Indiana Academy of the Social Sciences was held at Indiana University during the last week of April. Professor Harry D. Gideonse, of the University of Chicago, delivered an address entitled "Some Reflections on Freedom and Order"; research in the social sciences was discussed by Professors Paul C. Glick, of De Pauw University, and J. A. Estey, of Purdue University, and Mr. John M. McCaslin, statistician of the state department of public welfare; and Professors R. G. Thomas and S. C. Gilfillan, of Purdue University, and Edward H. Buehrig, of Indiana University, talked on current trends in the social sciences.

The Social Science Section of the Ohio College Association, which includes teachers of economics and political science at the Ohio colleges and universities, met at Ohio Wesleyan University on April 2–3. Seventy-five persons, representing twenty-eight different institutions, were in attendance. The program consisted of four panel discussions as follows: "The Future of Party Government in the United States;" "The Current Industrial Recession—Causes and Remedies;" "American Foreign Pol-

icy;" and "Governmental Reorganization in Ohio." The following officers were chosen for 1938–39: president, Paul T. Ellsworth, professor of economics, University of Cincinnati; vice-president, W. E. Binkley, professor of political science, Ohio Northern University; secretary-treasurer, Frederic Heimberger, department of political science, Ohio State University.

The New Commonwealth Institute, with headquarters at Thorney House, Smith Square, London, is an international institute founded in 1934 for study of the fundamental principles of international relations and for research on particular problems of international justice and security. The Institute carries on its work by collective and individual effort, maintaining a general research committee comprising forty-four leading experts on international law and relations, such as Judge Antonio S. de Bustamante y Sirven, President Nicholas Murray Butler, Judge Manley O. Hudson, and Professor David Mitrany. In addition, four special research committees on legal, military, political, and psychological questions deal with particular aspects requiring investigation by experts in these various fields. The results of the research carried out under the auspices of the Institute are published in three series of monographs and in a quarterly publication containing contributions in English, French, and German. The Institute has also established an information department, which publishes a monthly bulletin containing reliable data on questions of peaceful change and collective security.

Ends and Means. By Aldous Huxley. (New York and London: Harper and Brothers. 1937. Pp. 386. $3.50.)

Aldous Huxley makes no pretense of being a political philosopher, but much of what he says in his general philosophy has a direct interest for political scientists. The book here under review falls within the general field of political theory and is notable for its timeliness and comprehensiveness. So broad are the questions considered that it may be classified in the time-honored category of "moral philosophy." In it, Huxley puts aside his former dispirited cynicism to deal constructively with the world's greatest problems. Some readers will think him grown dull by comparison, but few will doubt his effectiveness and challenge.

Huxley has a profound scepticism of social amelioration effected primarily by institutional means. Reform, he says, must be originated at the periphery and proceed to the center. Individuals and small groups, working from the bottom up, must be relied upon to remold society. The fundamental verities for which they should strive in their "non-attached," ethically disciplined way are awareness, charity, and intelligence.

The central theme of the book is that ends cannot justify means, since the latter determine what the former shall be. Thus all forms of violence, including dictatorship, must be ruled out as leading, not to progressive charity, but to social regression. Planning, particularly economic planning, is essential to the correction of the injustices of our present system. To be effective, planning must follow certain principles: first, changes must not be so drastic as to cause violent opposition, which rules out, for instance, collectivization of agriculture, desirable though it may be from the viewpoint of efficiency; second, only "strictly necessary" changes should be made, foremost among which is the correction of uncoördinated large-scale industry managed by irresponsible persons seeking only profits; and third, changes should be made through the extension of familiar instruments of control. Here, Huxley advocates extension of state supervision of the profits and management of public utilities by such "mixed" enterprises as the Port of New York Authority and the London Passenger Transport Board. Both politics and money influence, he thinks, can be eliminated by such "functional" organizations supervised by groups of technicians.

But any planning depends for its success upon the context—political, psychological, educational, as well as economic—in which it operates. "To a greater or less degree . . . the civilized communities of the modern world are made up of a small class of rulers, corrupted by too much power, and of a large class of subjects, corrupted by too much passive and irresponsible obedience" (p. 66). Hence the political road to a better

society is the road of decentralization and responsible self-government. These formulæ the author advocates also for all community life, including industry, particularly since community government has become so technical that participation in it must be limited.

No civilized nation is likely to take these roads, however, since they operate in a *milieu* of militarism, war, and preparation for war, a situation which inevitably leads to centralization and dictatorship rather than to decentralization and self-government. Thus the author holds that war is the central evil of our times, and an examination of its causes leads him to consider the machinery for preventing it. The League has failed to achieve its ends because its sanction (means) is based on violence. The machinery for pacific settlement is desirable as an opportunity to avoid temptation, although the important thing is the will to use it, which is notably lacking at present. Here again the solution lies with the individual, in a new cosmology which may give to life a significance now supplied by war and nationalism, in industrial self-government eliminating the boredom which now offers a fertile field for the seeds of war. The first step in the series of changes is the development of small-scale working models of a better society by associations of devoted individuals. These associations are to be based on pacifism and non-violence and on coöperative business which may eliminate the obsession for money and power. The other purposes of these associations, such as a solution of the problem of inequality, of education, and of religious practices, which are discussed at some length by Huxley, help to make this one of those rare books which one enjoys reading even when one finds it impossible to accept all the author's conclusions.

Individual political scientists, economists, and sociologists doubtless have written with more assurance on the several aspects of Huxley's social diagnosis and prescription, but few are likely to bring a fresher and more masterful approach to the ultimate synthesis.

MARSHALL E. DIMOCK.

University of Chicago.

Political Institutions—A Preface. By EDWARD MCCHESNEY SAIT. (New York: D. Appleton-Century Company. 1938. Pp. vi, 548. $3.50.)

Professor Sait's book has three parts. The first, entitled "Methods of Approach," includes one chapter each on the theoretical, scientific, historical, and economic. Part two, on "The Origin and Law-making Function of the State," is notable chiefly for the six chapters on law, including brief historical essays on the Roman and English law and two chapters on international law. The third part includes the analysis of divergent types of states—constitutions; national and federal states; monarchy, aristoc-

racy, and democracy, with a chapter entitled "The Decline of Democracy"; representation; and public opinion and party.

The clue to the style and general point of view is to be found in the word "Preface" included in the title. While the book has similarities to general introductory texts such as those by Garner and Gettell, it is only a part of the book which was originally planned; the remainder is reserved for a second volume on the problems of government. In another sense, however, the book may be considered a preface, since it is there that an author reveals somewhat more personally his assumptions. Professor Sait makes some pungent comments on other political scientists in commenting and quoting. His dislike of some contemporary movements or policies seems at points to be the raw materials of his philosophy of "nature" and of "history." However perverse one may feel his judgment on matters, it is his view (p. v.) that "almost as a matter of moral obligation" one must speak out. This lightens what would otherwise be the somewhat pedestrian journey that general wanderings about a large and vaguely defined territory usually are. If at times he seems querulous and shrill, he can also indicate contradictions, expose vagueness, and place some institutions in an historical context that clarifies their present position. His summaries of the findings of the anthropologists and the historians of law are particularly interesting and helpful. Indeed, he draws upon wide reading in treating many of the topics considered. Sometimes, notably as he appraises the present status of democracy, he relies upon inadequate materials. Thus he cites with apparent confidence on this topic Lord Hewart's *The New Despotism* without mention of the later "Report on Ministers' Powers," which, after a polite gesture to that writer, exposed his heated generalizations to the destructive cooling of factual analysis. But his bias is frankly set forth in his attacks (e.g., pp. 463, 466) on the New Deal—("drunk with excesses," "strange lack of sanity," "insatiable thirst for power," "proposed degradation of the Supreme Court")—and the reader is enabled thereby to evaluate the validity of the argument and the selection of the data, if he has not been discouraged by the Liberty League style.

A dominant element throughout the book is Professor Sait's contempt for political theory and political theorists. This, stated at the outset, provides the materials for a theory of his own. It is not easy to grasp. One is sometimes so pleased by the trenchancy of his criticism of other writers that one tends to overlook the reliance on a "history" and "nature" that require sharper exploration and definition. The "excogitated idea derived from abstract thought" is Professor Sait's *bête noir;* hence his condemnation of all the works of theorists and "brain trusters." Ideas "take shape, subconsciously, through the influence of environment" (p. 6). "If the world changes, thought also changes" (p. 12). What is this world? Dis-

coverable, in political matters, by a political science? There is none (p. 25). "But nature does not make mistakes" (p. 25). "There are times when it is better to let nature take her course" (p. 290). "If the great mass of mankind are incapable of governing, so are the intelligentsia: nature governs us all" (p. 518).

Does this mean that we must "think with our blood?" From some passages, notably in his discussion of the historical approach, of the origin of the state, and of national states, we may deduce that Professor Sait is referring to the antiquity of institutions, their powerful persistence, and their rôle, coupled with kinship, nationality, and race, in the evolutionary process. No reference is made to Lasswell's treatment of related problems of political psychology. It is this awareness of the power of "the familiar scene," the fact that it has been selected by "nature" in the evolutionary process, that makes him critical of "ideology" and "rash adventures."

Professor Sait's skepticism, his awareness of the slowness of change, his insistence upon the importance of the work of anthropologist and historian, are the more substantial and valuable aspects of a point of view that at other points seems to have its own "subconscious" shaping, or its derivation from "excogitation" drawing upon too limited "observed conduct."

The reviewer noted only one correction for a second edition—on page 293 Wells is given as the author of *The Napoleon of Notting Hill* instead of Chesterton. In the discussion of Stoicism and Roman Law, no reference is made to Professor Sabine's introductory notes to his translation of Cicero's *The Commonwealth* in which a different position is well set forth. Indeed, the treatment of political theory in general neglects the need which men have, quite as much by "nature" as other needs, to form an intelligible and communicable view of the universe. Abstract thought, words, symbols, not divorced from but related to observed experience, are essential to meet this need. In that sense, even a social contract theory may have its historical justification—and, as in the history of the United States, rest upon historical fact, as the researches of Dr. Lois Matthews Rosenberry reveal.

The book is full of provocative passages, and, as a preface is supposed to do, stimulates interest in the volume to follow.

JOHN M. GAUS.

University of Wisconsin.

Social Philosophies in Conflict. BY JOSEPH A. LEIGHTON. (New York: D. Appleton-Century Company. 1937. Pp. xxii, 546. $3.25.)

The theme of communist and fascist challenge to democracy is becoming an increasingly popular one with both serious and popular writers in America. Articles and books relating to it have been pouring from the

presses during the past three or four years. Many of them have been rather superficial, offering few, if any, clues to the historical, psychological, and social conditions which have produced this challenge. Some have viewed the challenge as primarily an international one—dictatorships arrayed against democracies in a struggle which ultimately, at least, would not eschew a military decision. Many, thorough enough in their examination of the theories of dictatorial régimes, have neglected to provide a satisfactory survey of the prospects for revitalizing democratic theory and rehabilitating the democratic social order. They have viewed democracy as strictly on the defensive before fascist and communist onslaughts and have contented themselves with an inventory of democracy's traditional sources of strength and of the measures, legislative and administrative, which have been adopted to protect existing democracy against subversive agitation and activity.

The last criticism, at least, is avoided by the most recent volume devoted to the thesis of conflict between contemporary socio-political systems. Professor Leighton restates lucidly and concisely the prevailing nazi, communist, and fascist ideologies, and portrays the governmental and cultural pattern of contemporary dictatorship in remarkably vivid fashion. But the challenge of these systems to American democracy is not a challenge of rational alternatives. These systems represent, rather, the stereotyped pathological social conditions into which our democracy may relapse if it fails to rehabilitate itself. The author most emphatically contends that the crisis of our democracy is an internal one; that it has been caused by the thwarting of the democratic ideal in our life. He conceives political democracy to have been designed as an instrument for achieving a measure of social democracy; *laissez-faire* capitalism and the conditions of mass production have, however, hobbled political democracy and prevented the attainment of its objective. Instead of progress towards the democratic ideal, we have reaped economic monopoly, exaggerated disparities in wealth and income, and economic insecurity for the great masses. These have produced a social crisis which, unless resolved according to some adequate minimum standard of social well-being, will make continuance of democratic liberties and the democratic way of life impossible.

Professor Leighton's remedy is coöperative democracy achieved through an extension of state capitalism, governmental regulation, and the development of privately organized coöperatives. The remedy also involves reconstruction of the governmental machine to secure greater opportunity for majority decision, nationalization of political power, and the professionalization of the civil service. His description of the remedy is prefaced by a statement of a democratic social philosophy based upon a democratic ethical standard which insists that fulfillment of human

personality is the prime object of any legitimate social order. The statement is an entirely adequate one, and forms one of the most valuable features of the entire volume.

There may be some who will be disposed to criticize the author's indictment of traditional capitalism as unfair, or at least unduly harsh. There may be others who will feel that he has given insufficient attention to the problem of safeguarding from the rather imposing threat of bureaucratic and political usurpation whatever field of private judgment and action may remain in a social democracy. But whatever fault may be found with it, none can deny the importance of Professor Leighton's book. A renowned ethicist, with a deep and abiding interest in human welfare, exercising the ripened judgment of years of experience and observation, has produced a profoundly illuminating inventory of the weakness of our social order and has furnished at least the outline of a minimum program of reform necessary to democratic survival. If only the majority of humanity were half as humane as Professor Leighton and one-tenth as wise, there might be real hope for his faith in democracy. As it is, even the skeptic will have to accept that faith for his own; otherwise, as Professor Leighton has made reasonably clear, there can only be a choice between social chaos and the social discipline based on unreason and force which contemporary dictatorships so blatantly display.

ARNOLD J. ZURCHER.

New York University.

Communism, Fascism, or Democracy? BY EDUARD HEIMANN. (New York: W. W. Norton and Company. 1938. Pp. 288. $2.50.)

Few social scientists approach the contemporary "economic and spiritual crisis" with the assumption that they should concern themselves with its solution. Most of them either are too preoccupied with fact-finding or else shun "program-making" lest they be criticized for harboring hortative intentions. Professor Heimann is not so inhibited; but his hortation is so restrained that it will give offense to no one but the most confirmed seekers of facts-for-their-own-sake.

The author assumes that "integration and security through liberty is a matter of life and death to democracy." To resolve the dilemma implicit in the problem as stated, he combines two logically paradoxical, but not necessarily mutually exclusive, schemes which he finds in pre-industrial capitalism and in the classical socialist theory respectively. Separating the purely objective from the normative aspect of Adam Smith's and Karl Marx's theories, he affirms the continuing validity of their institutional norms for those occupational spheres in which the facts correspond to their presuppositions. With reference to these norms, Professor Heimann formulates his own for the contemporary diversified occupational or-

ganization, which is that "the pattern of social and property organization corresponds to the pattern of work."

Translating this norm into a concrete proposal with reference to the contemporary situation, he suggests that the individualistic organization and individual property be retained "where history has preserved the individualistic pattern of work and life"—primarily in agriculture—and that in those fields of industry where large-scale technology has ushered in "communal work," centralized organization and communal ownership be substituted for private ownership and control. Professor Heimann argues that the correlation of work, ownership, and organization implicit in the scheme will insure justice and preserve the democratic values of liberty and equality; and that security and integration will be provided by means of the plan in the one area and by the operation of the free market in the other.

Granting that every type of organization has its constitutional infirmities, this hybrid structure would seem to be particularly vulnerable because of the obviously precarious balance between its component parts.

By way of introduction to his projected solution, the author presents an eminently fair and incisive analysis of modern politico-economic systems, throughout which he shows a keen appreciation of basic causal factors. He juxtaposes the development of pre-industrial capitalism and democratic ideas and emphasizes the democratic aspect of classical socialism. He criticizes the orthodox socialists, who, serene in their assumption of the ineludible doom of the bourgeoisie, failed to seek a democratic solution of the problem posited by the unexpected vitality of the middle class, and thus helped to pave the way for the advent of fascism. The rise of fascism, which he deprecates because of its denial of liberty, he says, was also furthered by the insistence of the communists on enforcing equality at the expense of liberty in anticipation of a presumed outcome of an inexorable historical process. Professor Heimann is least convincing in his attempt to explain the causes of the anti-rational orientation of German fascism.

It is interesting to note that, where the author breaks away from the classical socialist tradition, i.e., in his diagnosis and his plan for agriculture, he reveals, and is conscious of, an affinity to the progressives of the American West.

HENRY JANZEN.

Hamilton College.

The Future of the Common Law. ADDRESSES AND REMARKS BY ROSCOE POUND AND OTHERS. (Cambridge: Harvard University Press. 1937. Pp. x, 247. $3.00.)

This delightful little volume contains the addresses and remarks of fourteen participants in the Conference on the Future of the Common

Law held August 19–21, 1936, as one of the symposia which formed part of the celebration of the Tercentenary of the Founding of Harvard College. The various essays are of uneven quality, and in general are informational rather than analytical. Political scientists will be most interested in the discussion of "The Common Law in Its Old Home" by the Right Honorable Lord Wright, Master of the Rolls, and in the address of Mr. Justice Stone on "The Common Law in the United States." The discussion of "The Common Law and the Civil Law in the British Commonwealth of Nations" by Professor Amos of University College, London, is exceptionally well done.

To Professor Amos, the common law is a definite set of legal propositions. Thus it champions liberty of testation, in contradistinction to the civil law rule that a man's widow and children respectively have an inalienable claim to a portion of his estate (p. 43). Abandonment of the defense of contributory negligence for a rule requiring the sharing of damages where both parties are at fault is a surrender, although a desirable one, to the civil law (p. 50). Lord Wright thus becomes an enemy of the common law, boring from within (see p. 91). Although this definition is frequently accepted by others, even after they have given a different one, the definition most frequently advanced is that the common law is a process of reasoning from judicial precedents. To Dean Pound, it revolves about the concept of *stare decisis*, being "a taught tradition of the place of adjudication in the polity of a self-governing people" (p. 10). This definition furnishes a convenient springboard for a discussion of the "tyranny of the cases" by Lord Wright (p. 79) and by Mr. Justice Stone (pp. 123, 125). However, the discussion scarcely measures up to the standard set by Mr. Justice Cardozo in his several charming little volumes of lectures.

The most valuable contribution is in the discussion of the rôle of statutes in common law countries. Lawyers who complain that "the legislature has changed the law on *us*" will do well to read Lord Wright's evaluation of the rôle of the statute in England, and Mr. Justice Stone's contention for a new attitude toward statutes in this country. "The reception," the latter states, "which the courts have accorded to statutes presents a curiously illogical chapter in the history of the common law. . . . I can find . . . no adequate reason for our failure to treat a statute much more as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning. We have done practically that with our ancient statutes" (pp. 130, 131).

There is a tendency in this country to confuse the "principles of the common law" with the American doctrine of judicial supremacy. Even Dean Pound, who has done so much in the past to force straighter thinking along this line, now gives evidence of falling into this error (pp. 10–11). Hence it is refreshing to find Mr. Justice Davis stressing the counter-

contention that a principal doctrine of the common law, and its greatest contribution to the public law of Canada, is "the doctrine of the sovereignty of Parliament." One would normally think that an explanation of the very basic differences between judicial review in Canada and its namesake south of the border would be out of place in such a gathering; yet our provincialism is amply testified to by the fact that it was the English, and not the American, participants who seemed most at home in those portions of the American continent not included within our own borders.

J. A. C. GRANT.

University of California at Los Angeles.

The Interstate Commerce Commission; A Study in Administrative Law and Procedure. Part IV. BY I. L. SHARFMAN. (New York: The Commonwealth Fund. 1937. Pp. xii, 550. $4.50.)

Part IV completes Professor Sharfman's great study of the Interstate Commerce Commission, the component volumes of which have appeared at intervals since 1931. The present volume's major purposes can be found in the systematic description of the Commission's organization and procedure, in the evaluation of that mechanism's capacity to meet an increasing administrative burden, and in the presentation of conclusions based upon the entire study. To the first of these objectives—an account of organization and procedure—the author devotes approximately two-thirds of the volume. Those concerned with the Commission's organization will find a full description of the Commission's personnel, its divisions and bureaus, together with a brief account of intra-Commission delegation of authority and functional coördination. The treatment of the procedural processes continues purposely confined to their technical aspects. But if the inquiry remains narrow in scope, its intensity cannot be doubted. Indeed, the Commission's several procedures, and the statutory, judge-, and Commission-made rules governing each successive phase of these, have been explained in exhaustive detail.

The remaining one-third of the volume examines the problem presented by the Commission's increasing business and sets forth an evaluation of the Commission based upon the author's entire study. In connection with the first of these matters, statistical presentation of the growth of the administrative burden provides background for a critique of the reorganization plans which have been advanced to enable the Commission to meet these new tasks. In his examination of these schemes, Professor Sharfman takes a firm stand against alteration of the essential character of the Commission and sharp reorientation of its course of development. He would sanction no change either in the Commission's independent status or in the wide discretion which it has hitherto enjoyed with respect

to procedure and organization. Indeed, the Commission's independence, which frees it from political pressures, and the flexibility of processes and organization, which permits their trial-and-error adaptation to practical needs, constitute, in the author's view, large factors in the Commission's ability at once to effectuate legislative policy in the public interest and to safeguard essential private rights. And this capacity for effecting workable adjustments between private interests and public welfare becomes, in turn, the fundamental basis for Professor Sharfman's final conclusion that the Commission typifies "the most orderly and fruitful instrument available for avoiding the pitfalls of both unrestrained individual freedom and outright collective action."

Some of the broader implications of Professor Sharfman's conclusions raise perplexing problems. It is clear, for example, that he regards administrative independence essential to any safe resort to administrative regulation which admittedly constitutes "virtually the only available method of effective public control under the complexities of the modern economic era." On this basis, indeed, rests the author's attack on the relevant portions of the Brownlow Report. But if he raises some convincing objections to that plan, it may yet be doubted whether he has answered the charge that the creation of independent agencies *pari passu* the steady advance of governmental regulation must inevitably result in an anarchy of policies. Professor Sharfman suggests, indeed, that coördination of the several administrative policies constitutes the function of the legislature. It must be answered, however, that even in a single economic field, the complexity of modern problems has confined legislation to a mere expression of pious hope euphemistically called a "declaration of policy." Certainly, then, we have no reason to expect more from legislation when its subject is the coördination of complex activities involving many diverse fields. Practical, day-by-day coördination of administrative policies can scarcely be effected by a mere resort to fresh legislative declarations of good intentions. In fact, such legislative "declarations of policy" can serve merely as a basis for administrative supervision of the primary regulating agencies—a form of supervision which must, however, impair the independence of those primary agencies.

Since exploration of the broad implications of regulation by independent commissions is not one of Professor Sharfman's main purposes, it would be captious to dwell upon his somewhat summary disposition of the aforementioned problem, important as it is to the future of that form of regulation. And this is the more obvious because, within the limits of its principal purposes, Professor Sharfman's work must be recognized as an authority unrivalled for breadth of research and lucidity of presentation.

JOHN A. SCHROTH, JR.

Princeton University.

State Administration. By Kirk H. Porter (New York: F. S. Crofts and Company. 1938. Pp. xi, 450. $3.75.)

The rôle of the scholar in the field of public administration has for some time been the subject of much controversy and debate. Those who have specialized in this field have urged with a sort of pioneering enthusiasm the continued expansion of their subject to a point where it would seem to embrace virtually the entire range of political science. On the other hand, there are students who have challenged the basic assumption of competence upon which the claims of the devotees of this newest branch of political science rest.

This family quarrel among scholars has in some respects proved beneficial. Its chief value has been to foster a careful re-examination of the subject of public administration for the purpose of determining more clearly the extent to which teaching and research in this field may profitably be developed by academicians. The wholesome effects of this injection of intelligent skepticism into the field are already becoming apparent in the wider acceptance of the fundamentally sound view that while public administration is quite properly a major and distinct branch of political science, the sphere within which the student of political science can operate effectively as a teacher and scholar is a distinctly limited one. It is being recognized that the competence of the scholar who devotes his attention to public administration is restricted to the consideration of general principles and to the analysis of the larger problems of overhead controls, organization, allocation of powers and responsibilities, and intergovernmental relations. This means that the study and evaluation of the great mass of detailed and technical administrative procedures must be left to the technicians and practitioners; for these are matters demanding a specialized training which the academician under ordinary circumstances does not possess and cannot acquire.

Professor Porter has apparently recognized in his textbook these limitations upon the scope of academic inquiry. "It is the purpose of this book," he observes at the outset, "to outline the numerous activities in which every one of the forty-eight states may be expected to engage today, and to propose ways of organizing suitable agencies for the proper administration of these various services. . . . The actual work of the various offices and departments has been discussed—but not in the detail that would be necessary in a book devoted to the technique of administration." The author is to be commended for the skill with which he subsequently maintains intact the boundaries thus established for his study.

The opening chapter presents some general definitions and distinctions and considers in broad outline the problem of state administrative structure. After a second chapter treating the position of the governor as

chief administrator, there follow a series of chapters dealing with the staff functions of finance and personnel. At this point the author inserts an excellent chapter on the limits of concentration. The last half of the book is devoted to an analysis of the line or service functions of education, health, welfare, agriculture, conservation, highways, utilities and transportation, and business and labor.

Professor Porter joins the small but happily growing group of students who refuse to accept unreservedly the well-known dogmas of administrative consolidation. He believes, in fact, that full and direct power over the principal staff agencies will provide the governor with all the authority that one man can reasonably be expected to exercise intelligently over the entire field of state administration. For the bulk of the service functions, the author recommends that control be lodged in each case in the hands of a lay board, the members of which, by virtue of long, overlapping terms, would be practically free from executive domination. Administrative management of each department would be vested in a full-time director appointed by and serving at the pleasure of the lay board of control. It is impossible here to list the many telling arguments advanced in support of this proposition. In the reviewer's opinion, the author has proved his case. Armchair logic is not a cure-all for the ills of the governing process.

Some criticisms may be offered. The materials used are largely from secondary sources. As a result, the book is somewhat lacking in specific examples and illustrations which are to be found in abundance in the primary source materials on the subject. The analysis of state activities in the field of labor relations is sketchy and incomplete. The treatment of state planning as an auxiliary function of the department of conservation reveals a much too narrow concept of the nature of this activity. The constructive approach, which is emphasized throughout, entails a considerable amount of repetition. A chapter on the courts and administration would have given more balance and perspective to the study. And finally the question may be raised as to the desirability from the pedagogical standpoint of a text which deals with the subject of public administration in this country at but a single governmental level.

PAUL T. STAFFORD.

Princeton University.

Personal Income Taxation. By HENRY C. SIMONS. (Chicago: The University of Chicago Press. 1938. Pp. xi, 238. $2.00.)

The author states at the outset that "this book perhaps combines strangely the characteristics of an academic treatise and a tract for the times." It is not, however, written primarily for lay readers, unversed in economic and political theory and practice, but rather for serious

students of public finance, and particularly for those concerned with the broadest and most fundamental problems of economic and political policy.

Professor Simons disavows an unbiased "scientific" objectivity, admits having a "philosophy" and "preconceptions," and flays those students of fiscal policy who "maintain a pretense of rigorous, objective analysis untinctured by mere ethical considerations." The gist of his main thesis is that highly progressive income taxation is "the means of mitigating inequality" and obviating regimentation, and thus of maintaining and perpetuating a reformed system of free enterprise and democratic government.

Two chapters are devoted to definitions of income and their limitations. Most of the seven remaining chapters on "special problems" (income in kind, gratuitous receipts, capital gains, tax-exempt securities, undistributed corporate earnings, Professor Fisher's proposals, and a supplementary note) really continue the definition discussions. The numerous untranslated extracts from German writers of the last half-century present most of what is not already familiar to American students.[1]

Professor Simons' position may be illustrated by his condemnation of the much-lauded British income tax—in contrast to the supertax—as a tax on income *from things* rather than a tax according to the total amount of income *received by a person*. He favors a very inclusive definition of income, one that covers practically all gains of a person, including gifts, inheritances, and capital gains—negatively, capital losses. He makes several important concessions, however, because of administrative considerations, particularly with reference to certain "incomes in kind" and to "realizable" gains not actually "realized." " 'Income is the money value of the net accretion to one's economic power between two points in time' (if one includes power exercised for consumption purposes)"—Simons' adaptation of Haig's adaptation (presumably) of Schanz' definition.

The author favors an initial rate of about twenty per cent, but without increase of present effective top rates. He would have the tax administered by the federal government and shared generously with the states, though he does fear that this might involve "a dangerous increase in federal powers at the expense of the states." He would retain the tax on land at stable rates but, "save for the gasoline taxes and certain levies desirable for regulatory purposes, all excises, tariff duties, license taxes, and other miscellaneous regressive levies would be eliminated from both federal and state tax systems."

Different parts of this book were written in different years and have

[1] Wueller's current series in the *Political Science Quarterly* should make foreign definitions of income accessible to a still larger circle of Americans.

not been combined into a thoroughly unified and consistent whole; the reader who skips the preface will probably be misled as to the author's present position. The treatment is incisive and provocative, not to say dogmatic and caustic at times. This reviewer agrees with most of the theoretical positions taken by the author, although he infers (possibly erroneously) that Professor Simons has more faith in the long-run efficacy of frequent jerkings of economic levers, especially monetary manipulation. Mention will not be made here of the common resort to taxation by nearly all varieties of social reformers.

ROY G. BLAKEY.

University of Minnesota.

Nationalgeist und Politik: Beiträge zur Erforschung der tieferen Ursachen des Weltkrieges. Volume I. By FRIEDRICH HERTZ. (Zürich: Europa-Verlag. 1937. Pp. 479.)

Europa und die Deutsche Frage: Eine Deutung und ein Ausblick. Second Edition. By FRIEDRICH WILHELM FOERSTER. (Lucerne: Vita Nova Verlag. 1937. Pp. 513.)

Von Rechts nach Links. By HELLMUT VON GERLACH. (Zürich: Europa-Verlag. 1937. Pp. 275.)

These three books, so different in purpose, scholarship, and method, have one point in common. All look on the pre-War period and contribute to an understanding of the causes of the world catastrophe. There is a growing sentiment, first asserted by Leonard Woolf, that in spite of the enormous literature which we have concerning the antecedents, the diplomatic history, and the responsibilities of the World War, we have no work of real importance giving a satisfactory explanation of an event of such magnitude.

Friedrich Hertz, a Viennese scholar formerly of the University of Halle, whose book on *Race and Civilization* aroused general attention, undertakes here the task of "exploring the deeper causes of the World War;" this is the first volume of a work which promises to become a daring and significant enterprise. He is convinced that the really fundamental forces of the World War escaped the attention of the diplomatic historians, because "they lie deeper in the collective spirit, the state tradition, national consciousness, the ideology of the ruling classes." Therefore he chose as title of his book "National Spirit and Politics," aiming at the comprehension of spiritual types and individualities which determine the foreign policy of the leading countries. From this point of view, the external events receive only a restricted treatment, just to the extent that they reflect the essential features of those historical individualities. The present volume and those which will follow are the fruit of many years

of research devoted to studying the development of the national and supernational spirit. The work begins with an analysis of the state-ideology in England, Austria, Russia, and Prussia in connection with Bismarck's foreign policy, German-French relations, and the Oriental problem. The growth of nationalism is portrayed in all the leading countries, the points of agreement and difference being emphasized. All the influential founders of the national and imperialistic ideology in the different countries and their practical repercussions in propaganda organizations and pressure groups are interpreted with remarkable originality and penetration.

Though nationalism and imperialism everywhere show many common traits, one cannot help being impressed in the survey of Professor Hertz by the fact that in no country of the world have nationalism, racialism, and Machiavellian power policy assumed such an extreme, open, and systematic formulation as in modern Germany; and nowhere has propaganda for war developed such widespread organization and emotionalism as in the *alldeutsch* and similar associations. It is startling to see that all the main points of Hitler's creed were already firmly established in pre-War German ideology and in large sections of public opinion. The leader of the Prussian Junkers, F. von der Marwitz, accused Hardenberg, with his semi-liberal reforms, of proposing to make Prussia a "*neumodischer Judenstaat.*" Also, the ideology of a "*Grossdeutschland und Mitteleuropa,*" which became the war aim of Germany during the World War and which is a strong *Leitmotiv* in her present policy, was widely discussed in the last decade of the nineteenth century. Equally significant is the demonstration by the author that the constantly growing spirit of domination and expansionism had nothing to do with economic difficulties. On the contrary, facts show clearly that the last decade before the World War was a period of enormous prosperity for Germany. Ideologic forces outweighed economics.

The book of Friedrich Wilhelm Foerster, the well-known pacifist who lost his chair at the University of Munich and was imprisoned for his denunciation of Prussian militarism, treats of the German problem in Europe. He tries to give "a philosophy of the European crisis" from the viewpoint of his personal experiences. His whole deeply religious individuality is rooted in the humanism and universalism of the classic period of Germany. He sees a kind of apocalypse in German history, the logical outcome of the militaristic and Machiavellian spirit which originated in Prussia and growingly permeated all Germany. The whole book tries to demonstrate how modern Germany came into inevitable conflict with Western Europe, being based on utterly different moral and political principles. The most important and representative antagonist of the Bismarckian era he finds in the deep political philosopher Constantin Frantz,

to whom he devotes many eloquent and penetrating pages. Germany could not escape expansion and imperialism when she did not listen to the admonition of Frantz that the historical rôle of Germany lay, not in constructing by blood and iron a nation-state of the Western type, but in leading the many nationalities of Central Europe towards cultural autonomy and federalism. The author submits a new and heavily documented analysis of the war-guilt problem, in which he accuses Germany of being uniquely responsible for the catastrophe. Though the reader feels on every page of the prophetic book the sincerity and passionate idealism of the author, and will be thankful to him for many of his illuminating experiences and recollections, he cannot fail to recognize a certain one-sidedness and exaggeration in his attitude (not astonishing in a man so constantly persecuted) which attributes to Germany an almost demoniac rôle in European history.

The posthumously published memoirs of Hellmut von Gerlach were written without any predetermined thesis. They constitute an extremely interesting document for interpretation of pre- and post-War German policy. Coming from a Junker family (two of his brothers served in the Imperial Guard), the author was for thirty years an ardent nationalist and a stanch anti-Semite under the leadership of Stöcker; but later his studies and his highly developed sense of justice made him a convinced liberal, and he even espoused some principles of moderate socialism. Especially the ideal of pacifism became his main political passion, and in 1920 he was almost killed by a group of nationalistic army officers. His book is a simple, sincere, unsophisticated story of his long experience as a publicist and of his extended travels in Europe and the African colonies of Germany. His observations concerning the policy in the *Ostmark*, the terrible exploitation of the agricultural workers in the eastern parts of Prussia, the inhuman treatment of the Negroes in Africa, the growing nationalism before the War, the utter helplessness and cowardice of the Republic in grasping social problems, especially those of the *latifundia*, supply new material for the understanding of this important period.

OSCAR JÁSZI.

Oberlin College.

The Labour Party in Perspective. BY C. R. ATTLEE. (London: Gollancz. 1937. Pp. 287. 7s. 6d.)

The People's Front. BY G. D. H. COLE. (London: Gollancz. 1937. Pp. 366. 7s. 6d.)

In his clearly written book, the leader of the British Labor party gives in simple language a survey of the historical development, the organization, and the present policy of the political labor movement. The foreign

reader can readily perceive in this book the qualities of directness and simplicity of expression and the sincerity in socialist faith which doubtless were important in elevating the author to the position of leadership of his party. At the same time, the facility in making an impassioned appeal and the capacity to touch humdrum matters with a fire of enthusiasm—qualities also necessary for outstanding success on the part of a politician—are conspicuous for their absence. If it cannot be said that the British Labor party at the present time has a brilliant leader, this book at least makes it clear that it has an able and solid one, and one who is not likely in a time of crisis to forget the basic aspirations of the laboring masses.

Professor Cole has written the present volume in his usual compelling manner, and as usual displays his great wealth of knowledge of the social conditions of Britain. This volume, however, unlike most of those in the now quite large Cole shelf of books, has about it an air of unreality. A book about something that has never existed, that does not exist at present, and that has only a remote possibility of coming into existence in the future fails to hold the interest of the reader throughout. Professor Cole is convinced that the only hope of ousting the National Government in anything like the near future is a People's Front, stretching from the Communists on the extreme left to many millions of nominally Conservative voters on the right, who in recent years have been supporting the National Government, but who, Professor Cole believes, are progressives at heart.

Professor Cole makes out a strong case, but his book will convince few who are not already convinced that the Popular Front is a practicable tactic in British politics. Mr. Attlee also comments upon the Popular Front, and, as might be expected, expresses the official opposition of the Labor party. To the present reviewer at least, Mr. Attlee has the better of the argument. Professor Cole never seems quite to face up to the fundamental difficulties in the way of a Popular Front in Britain. After all, if non-socialists are to form an important element in the movement, its policy cannot be socialist; yet it would be foolish to suppose that the socialists will renounce their creed in order to further the success of the Popular Front. Professor Cole himself says quite frankly that his purpose in advocating the Popular Front is to further the cause of socialism. In fact, it is interesting to find him reaffirming his belief in guild socialism. British Liberals, not to mention the left wing of the Conservative party, are not likely to enter into league with persons who intend to put socialism into effect in the end. In like manner, Professor Cole never quite explains why the communists and the Independent Labor party should be included in the Popular Front, which is represented as a force for the realization of democracy.

In last analysis, the real difference between these authors is that Professor Cole sees no hope for the electoral success of the Labor party in the next few elections if it insists upon standing alone, while Mr. Attlee refuses to give up this hope. The leader of a party that has tasted power could hardly hold any other opinion, and there is no doubt but that this opinion is concurred in by the overwhelming majority of members of the labor movement.

Mr. Attlee's book will be appreciated by the foreign reader for its brief but clear explanation of the history and structure of the Labor party, and its authoritative exposition of the party's immediate aims. The major portion of Professor Cole's book is made up of his statement of what he supposes might be the program of a coalition of the groups of the left. There are many points of agreement between the two on matters of policy. Probably the most valuable part of Professor Cole's book for the foreign reader is the brilliant analysis in the early chapters of the basic political predilections of the British people.

JOSEPH R. STARR.

University of Minnesota.

The Colonial Office. By HENRY L. HALL. (London and New York: Longmans, Green and Co. 1937. Pp. xii, 296. 12s. 6d.)

A good many books and articles have been written on British colonial history and policy; and some of these have dealt with various aspects of colonial administration. But this work presents a more intensive study of colonial administration, based on the official records of the Colonial Office from 1836 to 1888, parliamentary debates and papers, as well as biographical and other materials. In comparison with the smaller volume, in the Whitehall Series, on *The Dominions and Colonial Offices*, by Sir George V. Fiddes, permanent under-secretary of state for the colonies from 1916 to 1921, it does not deal with the self-governing dominions (except for the period before responsible self-government was established); but it covers the limited field more thoroughly.

Dr. Hall divides his book into two main parts—on administration and policy. Part I deals with the organization and staff of the Colonial Office, its relations to other departments and offices, and the governors and civil service of the colonies. Of special importance is his account of the attitudes, opinions, and influence of individual ministers and permanent officials. From 1830 to 1887, there were 32 cabinet ministers in charge of colonial affairs, and 27 parliamentary under-secretaries, but only five permanent under-secretaries. Only four ministers served for as long as four years, and in one year (1855) there were four ministers. The permanent secretaries held office for eleven or twelve years each, and Sir Robert Herbert for twenty-one years (from 1871 to 1892).

From 1887, there have been 17 ministers, 23 parliamentary under-secretaries, and 9 permanent under-secretaries. Joseph Chamberlain was secretary of state for the colonies for eight years (from 1895 to 1903), and seven others from three to five years each. The tenure of the permanent under-secretaries has ranged from three to five years, with the exception of one (Sir Samuel Wilson) for nine years (from 1925 to 1934).

Part II, on policy, deals with foreign policy (by which is meant the attitude towards colonial expansion, which often involved conflicts with other countries), policy toward native peoples, constitutional problems, special problems of several "difficult dependencies," the economic and social development of the Empire, and conclusions. On these matters, there are shown the varying, and sometimes conflicting, views of ministers, permanent officials, colonial governors and officials, and the colonists. Hall considers that "it was impossible to pursue any policy save indeed the general one of promoting the good of the Empire, encouraging self-government and developing the Empire."

During most of the nineteenth century, the Colonial Office was not eager for expansion, and in internal affairs left much to the discretion of the local officials. In later years, and especially under Chamberlain, there was increased activity in both fields.

In the concluding chapter, the author gives his estimate of the relative influence of the cabinet, Parliament, the ministers, and the permanent staff. Parliament had a good deal to do with the future of the Empire, and its intervention had both good and evil effects. Its debates aided the Dominions to attain self-government; at the same time, colonists were inclined to stir up trouble. He finds it difficult to be sure about the influence of the cabinet, because often no decision is recorded. But elsewhere (p. 67) he notes that no final decision could be taken without the concurrence of the cabinet, and that this not only meant delays but often the abandonment of some cherished plan.

The secretaries of state and their parliamentary secretaries spent much of their time in argument with each other, and often had to agree to differ. The influence of the permanent staff is said to be not nearly so great as is supposed; and instances are cited where they were overruled and in some cases not even consulted. But the author's citations from the minutes of these officials indicate that on many matters they determined the action to be taken. This seems to have been more pronounced in the period before 1887, when ministers changed more frequently and the permanent secretaries had a longer tenure than in the later period.

In the main, the literary style is good; but there is a marked tendency to lengthy paragraphs, some of them covering more than two pages.

JOHN A. FAIRLIE.

University of Illinois.

Survey of International Affairs, 1936. By Arnold J. Toynbee, Assisted by V. M. Boulter. (New York: Oxford University Press. 1937. Pp. xiv, 1006. $14.00.)

Historians are reluctant to deal with the recent past, on the ground that the "inside" documentary sources are not available. They are often equally reluctant to indulge in interpretation and generalization, on the ground that their task is to gather facts rather than to philosophize about them. Professor Arnold J. Toynbee, of the University of London, is singularly free from both these inhibitions. In addition to his distinguished work on earlier epochs, he has accepted the challenge of the present. He not only has assembled the factual data of current diplomatic history more fully and painstakingly than any of his contemporaries, but he has striven constantly to find the meanings behind the facts. As director of studies in the Royal Institute of International Affairs, he has surveyed world politics each year in a series of stout volumes which are so rich in content and so provocative and illuminating in presentation as to stand quite alone in the field.

The latest contribution to this series is, as before, largely the work of Messrs. Toynbee and Boulter, of Chatham House. It offers a vivid and detailed panorama of the crucial year in which Hitler repudiated Locarno and remilitarized the Rhineland. This development, with all its ramifications and repercussions, takes up a goodly third of the book. The remainder covers the London Naval Conference and rearmament, world economic affairs (by H. V. Hodson), the Montreux conference (by D. H. Routh), the Moslem Middle East (in part by H. Beely), Latin America (by Katharine Duff), and the Far East (by G. E. Hubbard). There is a chronology, and an index; also four outline maps. The Ethiopian war and the collapse of sanctions were dealt with in the 1935 volume. The war in Spain is to be taken up in the volume for 1937, though the Anglo-Italian "accord" of January 2, 1937, is discussed in the present volume.

"Brilliant" and "invaluable" are feeble adjectives to apply to a work which never loses sight of the forest despite detailed attention to all of the trees. In this volume, even more than in its predecessors, the clarifying value of a long historical perspective and the lucidity of a finely tempered mind have never been displayed to better advantage. The contributions of Professor Toynbee's co-workers are on a plane with his own high level of scholarship. But his own evaluations are the meat of the book. They are less the product of his own political prejudices than the fruit of long reflection on the historical process as a whole. His introductory analysis of the shifting balance of power and of the interrelationship between power politics and the clash of ideologies are masterly. His interpretations of day-to-day events are scarcely less impressive. His own preferences, to be sure, are not hid under a bushel. He favors collective security and an

ordered world society and deplores isolationism, muddling, and feeble surrenders to lawlessness. "Union is strength" seems to him a better slogan than "sauve qui peut." He does not hesitate to condemn French policy toward Mussolini as "sabotage" and "betrayal." Understandably enough, he is less severe on Downing Street, though in no sense a special pleader for the Tory conception of British foreign policy. He reviews the seemingly endless retreat of the forces of order before the forces of anarchy with refreshing detachment. But he senses acutely the direction of the march and sees darkly the shadow of things to come.

Only a few adverse criticisms of so admirable a work are warranted. There are too many footnote references to other volumes of the *Survey* and not nearly enough citations to such official sources of facts and quotations as parliamentary debates, treaty series, diplomatic correspondence, and the like. There is too much disposition to accept the record of revealed facts as complete, and insufficient imagination in putting in clear form the unanswerable but often decisive questions which secret diplomacy poses to the scholar. When, years hence, all the documents are available, the unanswered questions of today will be the most significant points of departure for future research. Finally, the reviewer cherishes the hope that the increased price of the present volume (38 s. in England) will not constitute a precedent. The *Survey* is worth every penny it costs. But a considerable circle of deserving scholars, both in England and America, will be prevented from ever owning the set if present prices are maintained. *Caveat mercator!*

FREDERICK L. SCHUMAN.

Williams College.

The Monroe Doctrine, 1867–1907. (The Albert Shaw Lectures on Diplomatic History, 1937.) BY DEXTER PERKINS. (Baltimore: The Johns Hopkins University Press. 1937. Pp. 480. $3.50.)

This volume, the third by Professor Perkins on the Monroe Doctrine, is probably the least satisfactory of the three. It is, however, a work of major importance on the subject.

With reference to the author's first volume on the doctrine, a volume which covered the period from 1823 to 1826, Dr. E. H. Tatum has remarked that Perkins was so absorbed in searching for materials in distant archives that he neglected some of the sources nearer home. For the years 1867 to 1907, access to foreign diplomatic archives is restricted, so that the work under review contains only a few citations to foreign office repositories—none for Latin America, none for France, fourteen for Germany, and some fifteen for England. Nevertheless, Tatum's criticism might be applied also to this work.

Judging from the footnotes—the volume contains no bibliography—one might conclude that Professor Perkins failed to examine at least a score of relevant books and articles, or else found nothing in them to justify a citation. In discussing the linking of the Monroe Doctrine with the canal issue, he makes no reference to the large work of E. T. Parks on the relations of the United States and Colombia. He fails to give the title of Howard C. Hill's volume on Roosevelt and the Caribbean, as likewise that of the only historical survey in existence of Latin America's place in world politics. He does not cite the monumental work edited by Samuel F. Bemis on the diplomacy of the American secretaries of state, nor Alejandro Alvarez's volume on the Monroe Doctrine, nor Allan Nevins's biography of Hamilton Fish, nor Orestes Ferrara's significant work on European attempts to prevent the Spanish-American War, nor Reuben Clark's notable *Memorandum*. In treating the first Venezuelan crisis, he makes no reference to A. L. P. Dennis's *Adventures in American Diplomacy*, which probably contains the most thorough discussion of the subject in print. And he appears to have neglected pertinent articles in the scholarly journals of Latin America, as well as at least two in the *Hispanic American Historical Review* (see Volumes VIII and X).

If one may venture a conclusion based upon his citations, Professor Perkins has relied mainly upon the works of Otto Stolberg-Wernigerode, Alfred Vagts, and Charles C. Tansill, plus the manuscripts of the State Department, the *Congressional Record*, and (for public opinion in general) a number of newspapers and periodicals, published for the most part in England and the eastern section of the United States. These are important and reliable sources of information, but they hardly justify the neglect of other works such as have been mentioned.

The first two chapters of the volume now under consideration sweep through the years 1867 to 1895, treating the principles of no-transfer and non-colonization, possible European control of Isthmian canal routes, and various other matters of relatively less importance. Two other chapters deal with the Venezuelan episodes, another contains a discussion of the employment and non-employment of the Monroe Doctrine during the McKinley administration, and a final chapter deals with the Roosevelt corollary and the initiation of the customs receivership in the Dominican Republic, this last a rather inadequate discussion of the subject.

Although no one else has made as complete a survey of public opinion relative to the famous doctrine, Professor Perkins has brought to light no considerable quantity of unknown facts. His main contribution, which should not be minimized, consists in his synthesis and interpretation. On a few specific points, which cannot be considered here, the reviewer disagrees with the author. Passing over these, it may be remarked that there is ground for fundamental disagreement regarding the larger subjects of

the broad purpose of the Monroe Doctrine and its relation to the isolation maxim. The reviewer thinks that the later policy is merely a reiteration of the earlier with emphasis on its expanded American phase, and he believes that the Monroe Doctrine, reduced to its minimum, has represented an effort by the national authorities at Washington to list those types of action on the part of foreign powers in America which have been deemed dangerous to the security and peace of the United States. Neither James Monroe nor any other single statesman could enumerate them all. Given the limitations of human vision, the process had to be gradual. As actuality, the doctrine is not what some rigorously logical professor may contend that it is. The doctrine is what those in direct control of the foreign policy of the United States have made it and conceived it to be. It is a broad maxim of security, whether immediate or remote, and sometimes even more than that.

J. Fred Rippy.

University of Chicago.

International Control in the Non-Ferrous Metals. By William Yandell Elliott, Elizabeth S. May, J. W. F. Rowe, Alex Skelton, and Donald H. Wallace. (New York: The Macmillan Company. 1937. Pp. xxi, 801.)

Professor Elliott and associated economists have produced in this impressive volume a research work of pioneer importance. Amidst the current pseudo-scientific generalizations about the raw materials problem from the "have-not" angle, it is a refreshing though sobering experience to follow this admirable analysis of the economic vicissitudes of some of the "haves."

One of a continuing series of studies sponsored by the Bureau of International Research of Harvard University and Radcliffe College, this undertaking was planned as a companion-piece to Brooks Emeny's *The Strategy of Raw Materials.* Its prosecution, however, involved difficulties of far greater complexity than Mr. Emeny faced in his investigation. Here the *peace-time* international efforts of six highly strategic metallurgical industries—nickel, aluminum, tin, copper, lead, and zinc—to control prices and output are subjected to minute analysis, each industry being treated by a specialist in the field. Not only was much of the data hard to assemble, but even when assembled, some parts would not readily yield to statistical comparability. There were, in addition, the usual limitations inherent in any coöperative research undertaking. As general coördinator of the project, Professor Elliott is to be complimented on the skill and ingenuity with which he succeeded in synthesizing the various contributions, even though a certain disunity of presentation was here and there unavoidable.

The volume is organized in two main sections. The first (a little more than 100 pages) consists of four chapters in which the political and economic implications of the case studies are set forth by Professors Elliott and Rowe (of Cambridge) and Mr. Skelton. The second part (some 700 pages) contains four chapters by Mr. Skelton (research economist of the Bank of Canada) on the nickel, copper, lead, and zinc cartels; one on the aluminum cartel by Dr. Wallace (of the Harvard economics staff); one on the international tin cartel and three on the American copper, lead, and zinc industries—all by Mrs. May of Goucher College. The findings are elaborately buttressed by innumerable tables and graphs on production and price trends.

For the layman the case studies make hard reading. This is in part due to technical complexity of subject-matter, in part also, it seemed to the reviewer, to the fact that the investigators were so completely at home with their material that at times they forgot that their readers might not be so familiar with its setting. Students of international organization will be chiefly interested in the interpretative comments of Professor Elliott, from the political angle, and of Professor Rowe, from the economic standpoint.

The general conclusions of political scientist and economist, while differing in emphasis, show remarkable agreement: First and foremost, the producers' cartel, although "part and parcel of the normal evolution of economic organization," is not an instrument suited to long-range international economic planning because it usually breaks down "under the pressure of two opposing factors"—the competitive desire to force out high-cost producers and the nationalistic desire for self-sufficiency by way of tariffs, quotas, export taxes, and subsidies. Thus such organizations tend "to take on a national color." If agreements are violated, price-cutting constitutes the only available sanction—at best of dubious value. In other words, they reveal all "the difficulties of a piecemeal internationalism." Second, while a cartel agreement (notably in the case of tin) may succeed in saving an industry from collapse during a severe business depression and therefore be justified, restrictions on output should end as soon as general recovery begins, so that obsolete excess capacity may be eliminated by competition. If artificial controls continue indefinitely, there is, moreover, risk of monopolistic exploitation of the small-scale, if not of the big, consumers of raw materials. Accordingly, America, as the world's largest consumer of tin, has recently had to pay abnormally high prices to the International Tin Association, the only one of the six cartels under scrutiny which is still in existence.

All of which leads the investigators to a final note of pessimism. Since a return to *laissez-faire* is impracticable, the only long-run alternative is a full-planned international economy which will at once open up ade-

quate supplies of basic raw materials to all nations at fair prices and prevent over-production with the attendant cyclical instability that it entails. It may be, as Professor Elliott suggests, that we are in a transitional period "between *laissez-faire* economics and a planned world economic system in which the closed nation is only a necessary but passing stage." Yet, with competing nationalistic "autarchies" the dominant trend, this transitional period may be long, chaotic, and perhaps catastrophic. For the hard task of political and economic statesmanship *in the meantime*, Professor Rowe has only this to offer: that both producers and governments must learn how to use artificial controls skilfully in the mutual interest of producers and consumers—which is like saying that peace must wait on education! This reviewer looked hopefully, but in vain, for some constructive suggestions, however tentative, as to how the vicious circle may be broken ere it is too late. Perhaps there is no orderly way out of the impasse.

WALTER R. SHARP.

University of Wisconsin.

Malaysia; A Study in Direct and Indirect Rule. By RUPERT EMERSON. (New York: The Macmillan Company. 1937. Pp. xii, 536. $5.00.)

In his introductory chapter, Professor Emerson states that his primary purpose in writing this book "is to explore the history, structure, and working of the political systems established by the British in the Malay Peninsula and, in a comparative fashion, to give at least some indication of the very different systems of the Dutch in the neighboring Indies." The author's ultimate purpose, however, seems to have been to study the manifestations of "imperialism" in a particular area rather than the governments and politics of Malaysia *per se*, and it is in the contribution that it makes towards an understanding of the general problems of colonial government and imperial policies that the chief importance of Professor Emerson's book lies. For although students of these subjects may differ from the author in the interpretation and ethical evaluation of British and Dutch policy in Malaysia, they can hardly fail to be indebted to him for a lucid statement of what those policies have been, and how they have been carried out. Specialists in other areas of colonial government will find comparative material of the greatest value in this description of the institutions that two European states have developed from Malayan materials in the Middle East. They may also profit from a careful consideration of the technique that has been employed in making this study, which has "slowly arisen" out of a year's field study complemented by a wide use of documentary sources.

In dealing with the extremely complex political, racial, and economic

problems of Malaysia, Professor Emerson has utilized the historical-descriptive method of presentation with great skill. The book is well organized and is written in a style that is always clear and often pungent. Institutions and policies of today are made understandable by being placed in an adequate physical, ethnological, and historical setting. The essential facts concerning the government of the Straits Settlements and the British Malayan states, federated and unfederated, individually and collectively, are effectively presented. This study is illuminated by comparison with Dutch rule in the Netherlands Indies, the material concerning indirect rule in the Dutch outer possessions being especially significant. Throughout the book, generous and intelligent use has been made of statistical material. In the opinion of the reviewer, however, a more complete and significant picture of British rule in Malaya would have been presented had there been a more adequate study of the great public services, especially public health, public education, and public works, and their effect upon the people of the country.

Professor Emerson describes the policy of direct colonial rule as one under which "a European authority was established in a colony operating within a European administrative framework and reaching directly every person in the community through officials largely drawn from the local population but appointed from above." The basic principle of indirect rule, on the other hand, is that "colonial peoples can more conveniently be governed through the agency of their own traditional leaders operating within the traditional institutional framework, as modified to meet European needs and preconceptions." During the twentieth century, however, indirect rule has become "merely an alternative form of colonial administration." The degree of European control has proved "no whit less than in directly ruled areas, and the barriers to the extension of European enterprise no greater." The alien yoke "may weigh less heavily, but it is just as much there as if no padding had been inserted between it" and the shoulders of the native population. For these conclusions this book affords ample basis, so far as Malaysia is concerned. However, the masses of mankind still bear grievous burdens, whether they be the natives of British Malaya or under-privileged citizens of the great American Republic. It is something that the yoke should be padded.

As for "imperialism" in general, Professor Emerson deals with it in the spirit of the Salem witch-hunter. In his scholarly study of the Malayan states, he gives ample grounds for the belief that if the British hand were to be prematurely withdrawn, they would retrogress, in varying degrees, from a condition of peace, security, good government, and general, although very unevenly distributed, prosperity, towards the state of oppression, poverty, and chaos from which British rule has aided them to escape. The author makes clear what everyone who knows British Malaya

is fully cognizant of: that in the absence of British authority, the Chinese, a more aggressive and economically superior race, would take over the country and drive its native inhabitants into the tree-tops. He is not unaware of the Japanese interest in this part of the Malayan world. Yet by oft-repeated suggestion and implication, Professor Emerson pictures British "imperialism" in Malaya and "imperialism" in general as being necessarily selfish, exploitive, fundamentally indifferent to the interests of its victims, and generally a pathological condition brought about by the immorality of the "imperialist" powers. Is not this an emotional rather than a realistic attitude toward a political condition that has been present throughout history, that springs from natural causes, and that gives rise to the same vices and virtues that mankind exhibits in other political situations? Granted that the British, who constitute the governing class in Malaya, arrogate to themselves too large a proportion of the wealth that they help to create, and that they do not devote themselves unreservedly to the economic betterment and early political emancipation of the Malayan masses. Has the governing class within Great Britain, the United States, or the Netherlands a better record? Is there any likelihood that either the traditional native leaders in Malaya or the politicians that the modernization and rapid political emancipation of that country would elevate to power would go any farther in placing the general welfare before their own interests?

In the concluding sentence of his excellent book, Professor Emerson declares that: "The possession of the power of self-government is in the modern world the most vital instrument in the struggle for both economic and cultural survival." In one sense, this conclusion is sound. It is an unfortunate fact, however, that certain peoples do not possess the power to govern themselves under the conditions of modern life. The abrupt withdrawal of British authority from Malaya would not give the inhabitants of the peninsula that power or make it probable that they would acquire it within any appreciable period of time. The conditions of British rule, however, are such that while the Malayans are protected from external aggression and internal chaos, they have the same opportunity that the people of every country throughout history has had to prepare themselves for self-government and finally to possess themselves of political power. With all of its shortcomings, the rule of the Western alien provides this opportunity in Malaysia and in many other backward areas. The temporary dominance of advanced nations over less developed peoples seems to be one of the many phases through which mankind passes in its progress toward liberty and unity. There is no reason why this phase should not be studied as dispassionately as any other.

J. R. HAYDEN.

University of Michigan.

The Far East Comes Nearer. By H. Hessell Tiltman. (Philadelphia: J. B. Lippincott Company. 1937. Pp. 356. $3.00.)

Retreat of the West. By No-Yong Park. (New York: Hale, Castman, and Flint. 1937. Pp. xiv, 336. $3.00.)

Forty Years of American-Japanese Relations. By Foster Rhea Dulles. (New York: D. Appleton-Century Company. 1937. Pp. xl, 289. $3.00.)

It is perhaps true that writing on contemporary events is best done by the journalist rather than the scholar. Where primary "sources" are lacking, good reporting on the spot often suffices to present the clearest picture of what is happening. In the flood of books on the Far East, H. Hessell Tiltman's *The Far East Comes Nearer* is one of the best yet produced by a journalist. The author's thesis is that recent developments in Japan and the recent actions of the Japanese have brought the Far East within the sphere of America's vital interest. His book, however, is more an explanation and discussion of recent developments in Japan than an exposition of the vital interest of the United States and other nations in these events. Mr. Tiltman writes clearly, frankly, and without bias. He discusses Japan's drive for new markets and asserts that allegations of large-scale exploitation of Japanese industrial labor are incorrect. The discussion of Japanese politics and the part played by the military in recent years is particularly well done and should be read by everyone who wishes to understand Japanese policy. Conditions in Manchoukuo, the smuggling campaign in North China, and Philippine Independence are discussed in separate chapters with abundant and cogent examples to support the author's case.

Although this book was completed in March, 1937, Mr. Tiltman has clearly shown the causes for the current hostilities in China, which he predicts. These causes are to be found in the unfavorable economic position of Japan as a result of the depression and the terrific population problem facing the Japanese. Fear of a strong Chinese government unkindly disposed to Japanese designs and the influence of the aggressive military group on Japanese policy motivated the smuggling campaign in North China and the attempt to set up autonomous governments in that area. These actions, in turn, led to the hostilities of July and August, 1937. Finally, the author sees in another Pacific Conference, in which all Far Eastern problems could be discussed, the only alternative to a war which will eventually involve the United States and Great Britain.

Retreat of the West, by Dr. No-Yong Park, is an attempt by a scholar to sketch, in readable and popular form, the story of the rise and decline of Western imperialism. The book falls short of the type of sound presentation to be found in many textbooks on the Far East because it is a superficial treatment, and it derives no advantages from its popular style

because it is not good reporting. To describe Japan's dual system of government from the ninth to the nineteenth century by simply stating that "during these ten centuries the Emperor enjoyed the unique position of the vice-president of the United States" (p. 105) is neither an adequate explanation nor evidence of sound scholarship. To speak of the Japanese army covering Manchuria "as Notre Dame's Four Horsemen covered a football field" (p. 111) serves neither to explain nor clarify the Manchurian affair. It is unfortunate that such facetious analogies are sprinkled liberally throughout Dr. Park's book. The author's theme that the West is in retreat is not new, nor does he contribute any new interpretations to Far Eastern questions. It is not meant to imply that much of the author's description is unsound, but the book's defects detract greatly from its worth. In the words of Dr. Charles A. Beard, who wrote the foreword, "He has told well, in a playful and entertaining manner, a story that needs telling . . . " It might be added that there are many other books which tell the story better and without omission of many important facts.

In contrast to Dr. Park's book, Foster Rhea Dulles has surveyed *Forty Years of American-Japanese Relations* in a brief but scholarly work, well written and thoroughly readable. He states that the book is "an account of our political relations with Japan since 1898, . . . " and that "it graphically reveals the decline of American influence and prestige in the Far East before the relentless growth of Japanese political and economic power. It becomes a record of the practical failure of the policy popularly symbolized by the Open Door." In fact, the book is a study of the evolution of the Open Door policy, as seen particularly in our relations with Japan.

Beginning with a brief statement about American acquisition of the Philippines and the origin of the Hay notes, the author proceeds to carry the story through the Boxer uprising; the development of Japanese interest in Manchuria; the events of the World War; the effects of the Paris Peace Conference and the Washington Conference on the Far East down to the opening of Sino-Japanese hostilities in July, 1937.

Mr. Dulles' chapters on "dollar diplomacy" in Manchuria before 1914, and the chapters on American-Japanese relations since the Paris Peace Conference, are particularly well done and should be read by students of contemporary events. The author shows how the Open Door doctrine evolved from the simple statement of the Hay notes concerning "equal treatment" to the more complex doctrine as stated in the Nine-Power Treaty which included "equal opportunity for the trade and industry of all nations in China" and respect for China's integrity as well. The Bryan note of 1915 to Japan and China is pointed out as the first statement of the American "non-recognition" doctrine. To this might have been added

the American note to Japan in 1921 embodying the same declaration of non-recognition respecting Japan's actions in Siberia.

Concerning the Washington Conference, the author concludes: "The tragic mistake . . . was that its participants banked too heavily upon the continuation in power of Japanese liberalism, and at the same time weakened the position of the liberals by refusing to afford any recognition to Japan's historic aspirations" (p. 179). This statement might well be pondered by diplomats before another Far Eastern conference. In an excellent summary of the 1924 immigration act, the author concludes with this significant and provocative statement: "The ultimate results of the Exclusion Act were to strengthen the counter-movement of Asia for the Asiatics. Its fruits were to ripen in 1931" (p. 193).

On the whole, Mr. Dulles shows that while American policy has often vacillated, "neither in 1901, nor at any time since, has public opinion in this country given any mandate for intervention" (p. 50), and therefore it may be well to inquire whether a general policy of non-interference is still consistent with a large increase in our armed forces. The author points out that only when we have had the force at our command have we been able to effectuate a positive policy in the Far East. This type of action carries with it grave risks, however, which Mr. Dulles seems to think the American public does not wish to assume. Unencumbered by footnotes, although containing a good bibliographical statement in the appendix, this book is well worth the time of anyone who wants to obtain a brief, clear picture of the last forty years in our relations with Japan.

WILLIAM C. JOHNSTONE, JR.

George Washington University.

China and the World War. By THOMAS EDWARD LAFARGUE. (Stanford University: Stanford University Press. 1937. Pp. x, 278. $3.25.)

In his preface, Dr. LaFargue states two purposes which inspired his work: (1) "to show the intimate connection between such important questions as China's entrance into the war and the formulation of the Chinese program at Paris, and the internal political situation prevailing at the time these questions arose," and (2) "to give an adequate account of the main events which occurred in China because of the war and thus to correct the errors and distortions with which a too facile journalism has surrounded these events." Delving into the published and unpublished Western documentary material, the author has produced a well written account of certain Far Eastern phases of the World War; but, in the opinion of the present reviewer, he has not fulfilled the above-cited purposes.

The important action of Dr. LaFargue's drama occurs, not in Peking,

Shanghai, and Canton, but in Tokyo, London, Washington, and Paris. The "internal political situation" in China is hastily—sometimes inaccurately—sketched or is summarized in such non-enlightening statements as (p. 79): "The men surrounding Yuan were divided into several factions and cliques, whose aims and composition at any given time were difficult to determine." Even when, as in the excellent chapter on "China's Entrance into the World War," the story does deal with events occurring in China, attention is focused less upon the Waichiaopu than upon the Legation Quarter, and the exchange of views between interested foreign capitals overshadows the conflicts of opinion among Chinese leaders. In other words, China, instead of playing an active rôle in the drama, is little more than scene-shifter and property-man, setting the stage for the intrigues and maneuvers of *macht politik*.

It is not that the essentially passive nature of China's rôle in the struggle has been ignored. The author points out (p. 172) that "no nation was drawn into the war for such trivial reasons as was China. To drive out of China a thousand German traders and missionaries was not a reason for which the white man could be proud for dragging into a white man's quarrel the Chinese nation." The weakness of the study, in so far as it purports to deal with China, lies in the fact that the author is far less interested in China than in the war. Even a passive rôle needs to be thoroughly examined if it is to be accurately depicted, and there is no evidence—either in the text or in the accompanying bibliography—that such an examination has been undertaken.

On the other hand, whether or not it was any part of his original purpose, Dr. LaFargue has produced a well-documented argument against American participation in any future war "to make the world safe" for some cherished ideal. From the Anglo-Japanese correspondence, early in August, 1914, relative to Japan's participation in the conflict, down to the actual signature of the Versailles Treaty, the story of China and the World War is enlightening rather than edifying. For this reason the book is strongly recommended to the attention of all who are interested in the realities of international dealings and double-dealings.

G. Nye Steiger.

Simmons College.

Dai Nihon Gaikō Bunsho ("Japanese Diplomatic Documents"). Compiled by the Investigation Service of the Foreign Office. Vol. I, Parts I and II. (Tōkyō: The International Association of Japan. 1936. Pp. 1019, 1016. ¥8.00 and ¥7.00.)

Japan has never before proposed systematically to make available to historians the materials in her Foreign Office archives. Remote from the charges of guilt for the World War, she has not been under pressure to

match *Die Grosse Politik* and its successors, while the Imperial prerogative has shielded her Foreign Office from popular demands for information. Not only has there been no series such as the *Foreign Relations of the United States*, but also even the most patriotic diplomatic historians of the Imperial universities have been denied access to the documents, of whatever date, preserved at the Kasumi-ga-seki. This first volume of *Japanese Diplomatic Documents* is thus more significant as a break with a long-standing precedent of secrecy than for any specific content.

The new series, which is chronologically arranged, begins with Tokugawa Keiki's memorial of November 9, 1867, returning to the Emperor the administrative authority entrusted to him as Shōgun. This initial date makes possible inclusion of important materials on the transfer of control over foreign relations from Yedo to Kyōto. Volume I, in two parts—all as yet published—carries the collection through the calendar year 1868. Originals in French, English, Dutch, Italian, German, and Portuguese, where still extant, are printed in those languages and followed by Japanese translations. Where the original is in Japanese or Chinese, however, no translation is given.

Some of the material, of course, has never been made available in English, but there is little which has not been published elsewhere in Japan. This lack of new revelations is not due to censorship, but to the understandable fact that the archives for 1867–68 are fragmentary. For the sake of a fairly adequate picture, documents not preserved at the Foreign Office have been reprinted from other publications such as the *Meiji Shiyō* ("Essentials of the History of Meiji") and the *Iwakura-kō Jikki* ("True Records of Prince Iwakura").

Here arise the major faults to be found with the editing. The list of supplementary sources is not complete, and their selection is not explained. No adequate bibliographical information is provided for the titles cited. It is an unfortunate habit of Japanese scholars to omit all reference to editor, date and place of publication, and number of volumes, on the assumption that such relevant facts are superfluous for any competent reader.

Otherwise the editing is very good. The work is quite free from typographical errors, even in the reproductions of documents in various foreign languages. Dates have been meticulously checked and are given according to both the lunar and solar calendars. There is a good table of contents; also an index by subject-headings. Three indispensable appendices contain guides to Bakufu, Imperial, and Western officials and official titles.

The Japanese government deserves congratulation on its decision to commence publication of such a series, the usefulness of which to students of Meiji administration and diplomacy is obvious. It is to be hoped

that further volumes will not be long delayed and that the gap in time between events and publication will be progressively narrowed.

CHARLES B. FAHS.

Pomona College.

Boundaries, Possessions, and Conflicts in South America. By GORDON IRELAND. (Cambridge, Mass.: Harvard University Press. Pp. x, 345. $4.50.)

Gordon Ireland's *Boundaries, Possessions, and Conflicts in South America* was done under the Bureau of International Research of Harvard University and Radcliffe College and represents a real contribution to the study of international problems in South America. Boundary disputes constitute one of the most important single types of international problems of the republics of the South American continent. The eminent jurist, John Bassett Moore, once wrote: "It may be said that a very considerable part of the diplomatic history of Latin America reduces itself to an account of the struggle over boundaries. For this reason, and because of their great political and economic significance, these contests occupy a place of capital importance in that history."

The book is a mine of information. The author has adopted the simplest and most obvious arrangement. The book is divided into three parts. Part I, "Disputes and Adjustments," contains an alphabetical arrangement of the twenty-six boundary disputes which have arisen among the South American governments; Part II deals with "Island Possessions"; and Part III with "Existing Treaty Relations." The latter section lists the bipartite and multipartite treaties which relate to boundary disputes, and gives a paraphrase of the main features of those instruments. One of the most useful and helpful parts of the book for the serious student of the relations of the American republics is the extensive citation of authorities. The excellent footnotes alone would make the publication almost indispensable to one interested in inter-American relations.

Mr. Ireland presents the factual story of the boundary disputes and omits in most cases a treatment of the historical background and diplomatic incidents, except where he considers that they bear directly upon the boundary problem. The author states in the Preface that "the material has been built together from sentences, paragraphs, and chapters scattered in hundreds of books and distilled from the bulky reports of a dozen arbitrations, with the constant endeavor to approach the ideal of a compilation at once easy to read and useful to consult." Although he adheres in most cases to statements of fact, he has succumbed occasionally to the temptation to include rumors or "it was reported" statements about some of the more active and recent disputes. This in some ways detracts from the factual objectivity maintained in other parts. Pertinent and somewhat sensational incidents are included which might better have

been omitted. One cannot help but feel that mistakes of detail such as calling an ambassador a minister and the statement "banks of the Amazon and the Marañón" (as if they were distinct rivers) could have been avoided.

It would seem that Mr. Ireland might profitably have spent a longer time in correlating the material. One gets the impression that much time and effort have been expended in the collection of material, but that it has been hastily put together as a compilation of notes conveniently arranged. I could not but feel that a brief introductory chapter setting forth a bird's-eye view of the whole story would have been helpful. Although he attempts occasionally to give a brief résumé, most readers will probably regret that Mr. Ireland did not include some observations and conclusions as a result of his study.

The volume is not a legal treatise, and the author has avoided arguments on and generalizations from principles of international law. A mere statement of the bases of the respective claims, however, might well have been included within the scope of the study and would have contributed much to making it more useful.

The book contains very helpful maps, and it is rather surprising that so much has been done with the difficult question of visualizing the problems of maps. The maps might have been better executed and, in many cases, the names are too small and the drafting has not been planned in relation to printing on rather rough paper.

Mr. Ireland has done a tremendous task of research, and the general student of international affairs, and especially of South American relations, must be deeply indebted to him. He has blazed the trail; he has indicated the path for pursuing further studies in the field. He has furnished, in useful and convenient form, much material heretofore relatively inaccessible. The book is essentially a reference volume, and every student of inter-American relations will want to have it.

WARREN KELCHNER.

Department of State, Washington, D. C.

Great Britain and Palestine. By HERBERT SIDEBOTHAM. (London: Macmillan and Company. 1937. Pp. ix, 310. $4.00.)

Few aspects of the war settlements have remained in such a state of chronic controversy as the disposition of Palestine. Now, two decades later, when Great Britain has at last decided that the mandate is inherently unworkable, a distinguished British Zionist has rallied to the defense of his cause in a book which, though it makes little effort at objectivity, is, none the less, a contribution of distinct merit.

Mr. Sidebotham, the "Scrutator" of the *Sunday Times*, was one of the small group of Manchester enthusiasts who launched the war-time campaign for a British commitment concerning the future of Palestine. His

account of this campaign, its setbacks, and its final success in the Balfour declaration constitutes, from a historical point of view, the most valuable feature of the book. Although this account does not run counter to previous writings on the subject, it does bring into proper recognition the work of men such as Israel Sieff and Simon Marks, who collaborated with Dr. Weizmann and the author in the movement.

It is scarcely surprising that, with this background, Mr. Sidebotham should be bitter about post-war British policy toward Palestine. As he sees it, Great Britain might have settled the problem once and for all if, after the first Arab difficulties, the British had retorted firmly that the special treatment which they had given the Arabs in Iraq and the Trans-Jordan had freed them from any necessity of conciliating the Arabs by additional concessions in Palestine. At best, this seems a forced conclusion, for, while such a reprimand might have silenced the sons of Hussein of the Hejaz, it would scarcely have appealed to the Palestinian Arabs who had no special connection with that distinguished family. This argument in favor of a stronger British policy is based on the author's belief that a vigorous and progressive Jewish dominion in Palestine would have contributed quite as much to British prestige and security in the Levant as the hard-won friendship of the Arabs. To this, the logical reply is that such Palestinian friendship, however welcome, could not have been a substitute for lost British prestige among the Arabs.Great Britain had struggled for a century to establish this predominant influence in the Arabian peninsula, and it is idle to criticize her for attempting to retain her position there after the war.

Equally partisan is the author's reaction to the proposals of the Royal Commission. Although he is prepared to admit the soundness of the general principle of partition, he is unwilling to accept the frontiers as proposed by the Report. Here he is on firm ground, and he exposes the weaknesses of the scheme with devastating clarity. On the other hand, his alternative proposals—which would grant to the Jewish state a much larger portion of the coastal plain—would be certain to arouse an even greater Arab hostility than the existing plan. Clearly, there is no ideal solution for the Palestinian problem, and this eloquent presentation of the Jewish position is, in itself, an evidence of that fact.

GRAYSON L. KIRK.

University of Wisconsin.

The Process of Change in the Ottoman Empire. BY WILBUR W. WHITE. (Chicago: The University of Chicago Press. 1937. Pp. 315. $3.50.)

This careful and useful study sets apart and follows logically and chronologically an important aspect of the complicated "Near Eastern

Question." One definition of this question regards it as the problem of redistributing the territories which were in the Ottoman Empire at its maximum extent. Dr. White deals almost precisely with the problem so defined; his "process of change" includes the territorial and governmental phases; he endeavors, by using the adjective "international," to exclude economic, social, and cultural change; perhaps the adjective fails to cover political change in Turkey itself, which nevertheless forms an important element in the discussion. One who desires to know distinctly how each significant area in the Near East has arrived at its present international situation may here be satisfied as nowhere else in a similar compass.

Dr. White's purpose, however, of using the Ottoman Empire as a "case study" detracts somewhat from the book's usefulness for consultation. He has selected three countries for more detailed study than the rest, Greece for Europe (36 pages), Egypt for Africa (36 pages), and Iraq for Asia (31 pages). Other areas in the three continents are grouped together in briefer discussions. Adding at the beginning an "Introduction" and a chapter on "Turkey before 1774," and at the end a chapter on "Turkey since 1774" and a "Conclusion," the plan of the book appears. If all units had been treated in proportion to area or population, or to the less easily judged intrinsic importance, the size of the book might have been doubled. Yugoslavia (13 pages), Rumania (12 pages), and Bulgaria (11 pages), every one more important than Albania (13 pages), might each have had as much space as Greece. Syria (8 pages; the Lebanon has only a footnote), Palestine and Transjordan (10 pages), and Saudian Arabia (4 pages) are more important for many inquirers than Iraq.

The Introduction discriminates between "static" and "dynamic" changes. The former include the series of treaties, conventions, declarations, and the like which have established the degree of sovereignty in each entity from time to time; the second involve the succession of wars, revolutions, and illegalities which have accompanied most changes. The reduction of the Ottoman Empire into the Turkish national state and the subsequent history of its portions presents an unrivalled quantity and variety of both sorts of changes.

At the end of each discussion, a concluding paragraph summarizes the experience of the unit concerned. Most changes prior to 1918 involved war or violence. The pattern in Turkey-in-Europe was largely the advance of subject peoples toward independence; in Africa, other empires —France, England, Italy—took over the Turkish lands. The non-Turkish portions of Turkey-in-Asia were mostly separated off after the Great War, and there the mixed method of mandates was used: another empire takes the infant state by the hand and leads it until it becomes able to stand alone. Force has not been absent from the last process, as in Iraq in 1920, in Syria in 1925, and in Palestine currently.

The Conclusion presents suggestions for redefinition, in the light of the Ottoman story, of the notions of absolute sovereignty, the perpetuity of treaty provisions, the responsibility of states, and neutrality.

ALBERT HOWE LYBYER.

University of Illinois.

Morocco as a French Economic Venture; A Study of Open Door Imperialism. By MELVIN M. KNIGHT. (New York: D. Appleton-Century Company. 1937. Pp. x, 244. $2.25.)

The picture that Dr. Knight paints of France as a colonial administrator is harsh but realistic. This study, carefully and impartially made by a trained economist, shows that a colonial empire is an expensive luxury. It almost makes one wonder whether, after all, the "have not" nations haven't quite the best of it. For, as Professor Knight notes, "Algerian budget deficits alone, not counting military and many other expenses attached to the French budget, have cost the taxpayers of France nearly a billion dollars." The military expenses to the French government for conquering Morocco have amounted to about $500,000,000.

The author has selected as his task a case study of the Moroccan protectorate of France to determine whether the venture has been profitable or unprofitable to French economy as a whole. Inasmuch as the administration has been carried on under the Act of Algeciras, which guarantees the open door, the study also affords an opportunity to evaluate the processes of modern imperialism and their effects, both upon the native and upon the outside world, under ostensible commercial equality.

First, as regards the native side, a few of the findings are interesting. Over 300,000 acres of purely private property were seized in five years and turned over to land companies at figures ridiculously below the selling value. Although the natives outnumber the Europeans ten to one, they received only one-eighth of the amount allocated for hospital facilities out of the 1932 loan. When work was slack, the natives were the first to be discharged; nor were they eligible for public relief or social insurance. As a result of the breaking up of the immemorial economy of the Atlas régime, in the recent periods of drought a million and a half Berbers have been in frightful want, if not utter starvation.

As regards the foreigner, the government of the protectorate has used every possible method of escaping the guarantee of the open door. The treaties imposing this status are regarded as unjust and superannuated; therefore they have been "judiciously pruned and dwarfed by interpretation and expert neglect until they were very little in the way." Only when very flagrant violations were attempted did the Powers protest so vehemently that a strategic retreat was made necessary.

Finally, has Morocco profited France? Even here the answer is in the negative. On the whole, the colonial market costs more than it is worth because of artificially high colonial prices and because France often imports more at these prices from the colonies than she exports to them. Professor Knight's scholarly monograph makes abundantly clear that it is Mr. John Citizen who pays the bills for the prestige of imperialism.

GRAHAM H. STUART.

Stanford University.

BRIEFER NOTICES

AMERICAN GOVERNMENT AND POLITICS

Twenty Years of Government in Essex County, New Jersey (Appleton-Century Co., pp. x, 183, $2.00), by Thomas H. Reed, is an account of the origin and development of an unusually successful reform movement in New Jersey county government. In this densely populated section of the New York metropolitan region, a loosely-organized group of independent anti-machine Republicans has maintained during the past twenty years virtually complete control of the government of the county. Formed in 1919 in response to popular demand for improved standards of county governmental services, the Essex County Republican League, later known as the "Clean Government" group, quickly wrested the important county elective offices from the hands of the regular Republican organization, and despite an occasional defeat by either the "regular" Republicans or the Democrats in a subsequent series of spectacular political campaigns, it has managed to remain in power ever since. Dr. Reed has written the story in popular, sometimes picturesque, language. There is a brief sketch of the county governmental machinery and a cursory glance here and there at the administration of county institutions and services, but the trials and tribulations of the reform group in the arena of practical politics is the real center of his attention throughout the book. The success of the movement is attributed to the high caliber of its leaders, the support of the press, the naturally independent character of the commuter vote, the stupidity and venality of the machine group, and finally the favorable record made by the reformers in their management of county affairs. But the prospects for the future are uncertain. With their victory over the regular party machine, the independents have actually ceased being independent and have themselves become the machine. "It is one thing," the author rightly observes, "to stand on the outside criticizing the machine, especially one which supplies its critics with ample ammunition. It is another to handle a machine from within in such a way as to direct it toward ideals instead of spoils." The erst-

while reformers have thus fallen heir to all the liabilities as well as the assets of organized political power, and, like all reform groups occupying a similar position, their continued success will largely depend upon the effectiveness with which they discharge the new responsibilities now assumed. Eternal vigilance, it would seem, is also the price of good county government.—PAUL T. STAFFORD.

In a litho offset report, "To the Board of Commissioners of Roads and Revenues of Fulton County, the Mayor and General Council of the City of Atlanta, [and] the Atlanta Chamber of Commerce," the Consultant Service of the National Municipal League presents a survey of *The Governments of Atlanta and Fulton County, Georgia* (Atlanta Chamber of Commerce, $5.00). The report, though bound as one book, is arranged in two volumes, of 161 and 619 pages, respectively. Volume I treats in general of the governments of the city and county and of the metropolitan problem, and in addition deals in summary fashion with such functions and activities as schools, safety, public works, and recreation. Volume II consists of twenty-five special studies of the principal operations of city and county. Noteworthy among these are a sixty-five-page report on police forces, a seventy-page study of schools, and a fairly detailed (and in good part statistical) analysis of personnel. The usual approach, as regards a given problem, calls for (1) a description of what is, (2) a criticism of present practice, and (3) recommendations for improvement. Atlantans presumably will profit most from the criticisms and recommendations; outsiders will be intrigued by the many unique organizational and procedural features of government in the Atlanta area. The report is fairly well, if hurriedly, written, and good use is made of tables, maps, and charts. Dr. Reed and his staff have done a survey which, given proper support, could prove of immense benefit to Atlanta and Fulton county, and which in any case will be of interest to all students of urban local government.—ROSCOE C. MARTIN.

The marked revival of interest in unicameralism, due largely to the recent establishment of a one-house legislature in Nebraska, is reflected in the current popularity of the subject for high-school and college debating. Charles W. Shull's *American Experience with Unicameral Legislatures* (Detroit Bureau of Governmental Research, pp. 33) seeks to meet the new demand for concise information about the legislative process by summarizing, within the compass of a few pages, the principal facts in connection with the history of unicameralism and the controversy over the bicameral system. Professor Shull reviews very briefly the origins and growth of bicameralism in the British Parliament, in Congress, and in the state legislatures, and the progress of the unicameral idea from the early

Vermont legislature to the reorganization of municipal councils in recent years. The longest section of this survey deals with Nebraska's unicameral legislature, describing quite adequately the circumstances of its inception, its organization, and its first session of last year. It is to be regretted, however, that the new rules of procedure are not discussed in greater detail, for a judgment on such important questions as precipitancy in legislation depends upon the nature of the parliamentary rules adopted. Furthermore, the author obviously exaggerates the influence of the lobbyist under the new dispensation, reaching a highly debatable conclusion without considering the question from all possible points of view. On the whole, though nothing at all is added to our fundamental understanding of the problem, this pamphlet should prove useful as an aid to debaters who want a short statement of the essential facts. A more typical debater's handbook is Thomas A. Rousse's *Bicameralism vs. Unicameralism* (Thomas Nelson and Sons, pp. 238), containing model briefs supporting both sides, and a considerable number of short selections from standard books on American government and legislative procedure, and from more specialized articles and books on the particular question at issue.—DAVID FELLMAN.

C. Vann Woodward's *Tom Watson, Agrarian Rebel* (Macmillan Co., pp. xii, 518, $3.75) is an important contribution to the growing literature of political leadership. Watson's youth paralleled the "tragic era" and the collapse of the civilization which had nurtured him. As the fortunes of his family and community went with the wind, his sensitive nature galvanized itself into action, forging him into the prophet of the Southern populist movement. Apostolic zeal plus physical and moral courage characterized his fight to bring order out of the seething chaos of the post-bellum South, but like many another Dixie liberal his shining lance was broken on the rock of race prejudice. His leadership of Populism was filched by Bryan and his party ruined, bringing him an overwhelming sense of defeatism. Retiring to his study, the Georgian brooded over the wrongs of his section, and unconsciously and imperceptibly was led into the intolerance and intransigeance of a Southern bigot. Undoubtedly suffering from a persecution complex, he dipped his pen into the vilest cesspools of human prejudices as he launched campaign after campaign of hate against the Negro, the Catholic, and finally the Jew, eternally besmirching his past glory as a leader of men. Before he died he had become the spiritual father of the Ku Klux Klan. His career shows not only what "may happen here," but the anatomy of latent fascism in the South. Though writing sympathetically, the author in no case departs from judicial detachment. More studies of this scholarly sort are urgently needed.—J. B. SHANNON.

In January, the Oxford University Press published, under the title *Business and the Robinson-Patman Law* (pp. xiv, 298, $2.50), a symposium edited by Benjamin Werne. The contributors to it are "business men," professors, and lawyers. One of them says of the law: "This is another experiment in legislative interference with competitive processes which has much more in its favor from the standpoint of its kindly interest in the small merchant than it has either from the standpoint of the liberty of society or from that of sound economics." Another writer in the symposium adds: "The sweeping insistence of the Robinson-Patman Act that there shall be no 'discrimination' in price is flatly contrary to the policy which has heretofore been pursued by the government under the Sherman Act—that there shall be no 'uniformity' in price." These are typical of the interesting points of view expressed many times in the book. After a foreword by the editor, there follow articles grouped under the following headings: (1) the historical background of laws for the regulation of price competition; (2) the economic aspects of such recent legislation; (3) a legal analysis of the Robinson-Patman Act; (4) distribution; and (5) marketing under that law; and (6) a study of two pioneer decisions by the Federal Trade Commission, and their effect with especial reference to the lessening of competition and the remolding of our antitrust laws. The book is rich in citations to authority for the statements made; these are appropriately listed in an appendix. On the other hand, the index, printed on less than two pages, is woefully inadequate for a book of substantially 300 pages. Even more unfortunate is the fact that the text of the act is not included.—JOHN G. HERNDON, JR.

The first part of Dr. Maurice Leven's study, *The Income Structure of the United States* (Brookings Institution, pp. xi, 177, $1.50), considers two groups of factors which determine the distribution of wages and other individual incomes: "those related to the characteristics and environment of the income recipients, such as occupation, industry, age, sex . . . color," and group action or pressure, "and those related to the ebb and flow of business activity." A very brief chapter is devoted to "secondary income," for example, to how the "used" incomes of the well-to-do, the poor, and others are affected by taxes, charities, etc. The second part of the study deals with changes in individual and group incomes since 1929. Attention is called to the important rôle of prices in affecting the income structure. Occasion is taken to criticize, directly or by inference, various New Deal relief measures, and it is suggested that in the future remedies for the eradication of poverty and the improvement of the general welfare should be employed with more discrimination and should be better adapted to actual conditions and situations. Though the study presents relatively little that is new in the way of facts or ideas, we are, never-

theless, all indebted to Dr. Leven for his analyses. As more nearly adequate data on income distribution become available, we shall have still more need for thoughtful studies by competent analysts—more clarification and more vitalization of what are otherwise dry statistics to most readers. Moreover, such studies should not militate against our securing what we all will agree is even more to be desired, namely, more real income and also a better distribution thereof.—ROY G. BLAKEY.

The Floating Debt of the Federal Government, 1919–1936 (Johns Hopkins University Press, pp. 88, $1.00), by Edward Raguet Van Sant, is a good descriptive account of the rôle of floating debt (certificates of indebtedness and Treasury bills) in Treasury management. In the post-war period of Treasury surpluses, certificates of indebtedness, first adopted as a war-time expedient, continued to be issued in large amounts to facilitate the working out of a refinancing program that would make possible vigorous debt retirement. In the period of Treasury deficits since 1930, there has been a marked decline in the volume of the floating debt in relation to the total debt, but short-term obligations, now in the form of Treasury bills, remain as the principal means of interim financing. While recognizing the cheapness of short-term borrowing, the author properly emphasizes that this turns out to be a real advantage only in times of easy money, and that a sudden change in conditions may make a large floating debt very embarrassing to the government. Other observations made are that short-term securities tend to become concentrated in the banks, and thus debt obligations are not distributed among bona fide investors; that such securities have not, however, proved dangerous to the banks; that they have helped as equalizers of the money market at tax-payment dates; that although not ideal for the purpose, they have come to play an important part in the open market operations of the Federal Reserve system; and that, while contributing to the rise of prices during the War, their use since the depression has not had serious inflationary effects.—MARTIN L. FAUST.

In *The Undistributed Profits Tax* (Brookings Institution, pp. 108, $0.50), Professor M. Slade Kendrick analyzes 1,560 replies to a questionnaire distributed by Senator Steiwer to high-ranking officers of American industry. Since the approach is realistic rather than objective, and since the corporate viewpoint is the only one considered, it is natural to expect that such a study of the effects of the undistributed profits tax will discover little in the measure that is good and much that is bad. There is no disappointment in this respect. The analysis presents a devastating indictment of the tax and concludes unequivocally that it should be repealed. The fundamental weaknesses emphasized are that the tax limits

prompt and flexible capital developments, handicaps particularly small and medium-sized business enterprises, and bears severely upon new companies or those recuperating from misfortune. In addition, the author believes that "the practical difficulties in applying such a levy to the complex and varied organization and operation of American industry are such that equitable and effective administration is impossible." The study incorporates numerous and extended quotations from leaders in a wide variety of industries to substantiate views on the detrimental effects of the tax. Scant consideration is given to the arguments that influenced those responsible for adoption of the tax. The pamphlet presents clearly and forcibly corporation experience and the corporation viewpoint in relation to the operation of the undivided profits tax.—MARTIN L. FAUST.

Official intercourse between the foreign offices of the United States and Mexico has been so voluminous that two volumes of the *Diplomatic Correspondence of the United States: Inter-American Affairs, 1831–1860* (IX, *Mexico, 1848(mid-year)–1860*, Carnegie Endowment for International Peace, pp. xlviii, 1251, $5.00) are required to publish the documents. The ninth volume contains material relating to post-war efforts by the United States to obtain further advantages from her vanquished enemy. While Mexicans protested against filibustering expeditions, smuggling, and marauding bands of American Indians, the diplomatic agents of the Washington government bent every effort to obtain concessions along the Tehuantepec transit route, to rectify the boundary by the Gadsden purchase, and to persuade the Mexicans to part with Lower California. Eventually, the State Department, hoping for a more favorable reception, transferred recognition from the government at Mexico City to the Constitutionalists in Vera Cruz, but the period ended with only the futile Gadsden purchase to reward American efforts. American policy was consistent under the direction of Secretaries James Buchanan, John M. Clayton, Daniel Webster, Edward Everett, William L. Marcy, and Lewis Cass, despite their divergences in domestic politics; while the American ministers to Mexico—Nathan Clifford, Robert P. Lutcher, Alfred Conklin, James Gadsden, John Forsyth, and R. M. McLane—were almost uniformly ignorant and inept. In domestic affairs, the period was one of economic prosperity and of grandiose schemes promising exorbitant profits, and this spirit pervaded all the relations of the United States with her Southern neighbor. Dr. William R. Manning's scholarly editorial work will be appreciated by the specialist who uses these documents.—W. B. HESSELTINE.

In *The Administration of Public Printing in the States* (University of Missouri Studies, 120 pp.), Dr. Estal E. Sparlin presents a very good

summary of the law and practice of a not very well known but significant feature of state administration. Such extremely technical matters as type forms, contract specifications, and contract systems are treated in such manner as to be informative to the general reader and useful to the administrator. Dr. Sparlin gives attention to printing, procurement procedure, organization, and control methods used by states, pointing out the strong and weak points in each. Critical attention is given also to state production of printing. The technical nature of printing makes it especially adaptable, the author believes, to centralized control. Such control will make possible the securing of better contracts, more competent personnel, and other advantages so often lacking where control is decentralized. The thorough method of treatment and liberal use of practical illustrative material make the study a valuable contribution to the literature of state administration.—P. S. SIKES.

His Excellency George Clinton, Critic of the Constitution (Macmillan Co., pp. xiii, 325, $3.50), by E. Wilder Spaulding, assistant chief of the division of research and publication of the United States Department of State, is a comprehensive and scholarly biography of one of the noted early opponents of our federal constitution. Based on many original letters and papers, as well as on newspapers of the day, and numerous other sources mentioned in a bibliographical note, the work furnishes a broad treatment of Clinton's life and times. It indicates rather clearly that his strong opposition to the acceptance of the constitution by New York State is probably not the only thing for which he should be remembered. His long career in public life, as a soldier in the Revolution, as governor of New York for seven terms, and as vice-president of the United States for eight years, receives extensive discussion, and his great influence among the "masses of men" is emphasized. At the same time, one may glean from the book much information concerning Clinton's personal beliefs and characteristics, including, for example, a knowledge of his interest and activity in such a very human enterprise as land speculation.—MARTHA ZIEGLER.

The sixth edition of Robert E. Cushman's *Leading Constitutional Decisions* (F. S. Crofts and Co., pp. xv, 531, $2.00) includes, in addition to the cases reprinted in the fifth edition, the texts of three cases decided in 1937, i.e., National Labor Relations Board v. Jones and Laughlin Steel Corporation, The Associated Press v. National Labor Relations Board, and Charles C. Steward Machine Co. v. Davis. The editor summarizes in the new notes the history of federal activity in labor relations and the decisions handed down in connection with other social security cases. These notes and cases have been added to the appendix, with the result

that the book becomes an extended fifth edition. It is to be hoped that, in the interest of students who will use it, a future new edition will reclassify into proper categories the numerous cases now grouped together as an appendix. Such classification would add value to a book long distinguished for its capable editing and excellent notes.—GLENN B. MCCLELLAND.

The appearance of a new book under the name of *Government and Business* (Callaghan and Co., pp. xvii, 686) will lead the reader to expect a wide range of subject-material within its covers. The present volume—by Gerald O. Dykstra and L. G. Dykstra—however, is a case-book in constitutional law which greatly limits not only the subject of government and business, but the subject of constitutional law as well. The contents are restricted to a somewhat narrow list of topics, and are composed of certain historical decisions as well as the most recent decisions in constitutional law. Among the subjects included we find the following: interstate commerce, anti-trust acts, Federal Trade Commission, National Industrial Recovery, Agricultural Adjustment, bituminous coal conservation, regulation of securities, labor acts, social security, public utilities, the T.V.A., and marketing. In the opinion of the reviewer, the volume should be useful for reference in courses on government and business, but not as a basic work to support a course of so broad a character.—EARL W. CRECRAFT.

Constantly increasing governmental activity in many fields, coupled with the ever present necessity that pioneering legislative and administrative activity run the gauntlet of court inspection, complicates the problem of authors who would keep abreast of the changing scene. The challenge of constant revision has been met ably by Messrs. C. C. Rohlfing, E. W. Carter, B. W. West, and J. G. Hervey in the third edition of *Business and Government* (Foundation Press, pp. xviii, 780, $4.00). The general plan and organization of the earlier editions have been retained, but the authors have achieved extensive revision, including the adding of seven new chapters. New governmental activities considered are: government housing and farm tenancy legislation, agricultural crop control, producer and consumer coöperatives, government control of prices, and regulation of business by taxation. Theoretical problems are treated in two new chapters, "Business and Government" and "Theories of Constitutional Protection."—GLENN B. MCCLELLAND.

FOREIGN AND COMPARATIVE GOVERNMENT

The recently published volume by Frederick F. Blachly and Miriam E. Oatman, *Introduction to Comparative Government* (Ronald Press, pp. ix,

465, $3.50) is intended as a textbook for an introductory course in comparative government. The course for which the book is planned not only would have to be introductory in character, but would also have to be condensed. The authors state (p. 4) that the "purpose of this book is to examine the organization of government in the three great democracies, France, Great Britain, and the United States, and in the three chief exemplars of totalitarianism, Russia, Italy, and Germany." The hope is expressed that the book will "enable the student to comprehend the principles underlying these antagonistic systems and to appreciate the reasons for this antagonism." After introductory chapters dealing with the historical backgrounds and the fundamental doctrines of the democratic and the totalitarian states, the authors proceed with a discussion of the political institutions in the six countries. Considering the limited space used to present such multifarious material, their task is a thankless one, yet quite successfully accomplished. The reader is, however, struck by a seeming lack of balance in the presentation of subject-matter. If, as Blachly and Oatman point out (p. 442), "the most important political and social phenomenon of the present age is the struggle between the democratic state and the totalitarian state," it is strange that they dismissed the institutions of the latter so perfunctorily. It would take little short of a genius at the art of condensation to cover adequately the present institutions of government in Russia, Italy, and Germany in forty pages. The book, nevertheless, could be useful for courses in which the fields of American and European government are covered in one semester.—HARLOW J. HENEMAN.

In their *Short Constitutional History of England* (Longmans, Green and Co., pp. 260, $2.00), C. W. Prosser and Margaret Sharp offer a brief outline of the development of English political institutions from the Anglo-Saxon period to the present day. A happy combination of the topical and chronological methods permits the authors to give students in secondary schools, for whom the book is especially intended, a series of fairly complete pictures of the English government as a going concern at important stages of its development. The evolutionary character of these institutions is frequently pointed out, particularly in the treatment of the legal system and the powers of Parliament. The growth of democratic control during the last century is stressed. Out of the immense mass of available historical material, the authors have chosen only essentials. A brief selected bibliography is appended. The American reader might wish for a more extended treatment of the last hundred years, to which less than forty pages are assigned. However, about the proper apportionment of a strictly limited amount of space, as about matters of taste, it is profitless to quarrel.—ELMER D. GRAPER.

A very timely guide to the intricate situation that is being developed in Europe, and particularly among the neighbors of the Third Reich, where German-speaking populations exist, is *Ihr Kampf* (Carlsbad: Graphia Publishing Co., pp. 140), by Josef Fischer, Václav Patzak, and Vicenc Perth. The pamphlet is a good introduction to the constitution, the program, and the aims of the Sudeten German party in Czechoslovakia. The writers are adherents of the democratic conception of the state, and they show, by means of a rich collection of documentary material, the disturbing effects which the party has both on the problem of the appeasement of racial issues in that country and also on the general relationship between Germany and Czechoslovakia. The study helps to clarify considerably a subject that has been rather confused in the current press dispatches and news services in the American press. On the basis of profuse quotations from various documents and speeches by the leaders of both groups, the writers illustrate clearly that the problem of the German minority in Czechoslovakia is far less a problem between the German-speaking people in that country and the Czech-speaking people than a problem of how to reconcile the democratically-minded majority in Czechoslovakia with the totalitarian conception of race and state as adhered to by the supporters of the Sudeten German party, the activities of which are here regarded as detrimental to the real interests of the German-speaking population.—J. S. ROUCEK.

INTERNATIONAL LAW AND RELATIONS

The eleventh series of the Geneva Institute lectures, published, as is customary, under the general title, *Problems of Peace* (London: Allen and Unwin, pp. xiii, 254, $2.75), is devoted to "The League and the Future of the Collective System." The general level of the twelve lectures is higher than that set by many of the preceding volumes, and throughout many of them runs a note of healthy realism. Most ambitious, perhaps, of all the proposals is that of Herbert S. Morrison, who urges a new world conference "in which security, disarmament, economic, and colonial issues as well as the question of peaceful change, should all be included in the agenda." Concretely, he proposes that such a conference should frame an all-European treaty in which the contracting parties would frame a sort of new Geneva protocol. Inside this general framework there should be an inner ring of states that would renounce war completely as regards each other and would establish joint plans for military action to uphold the Covenant. Finally, this scheme should be complemented by the creation of a new international parliament, the delegates to which should be elected by the national legislatures of the member states on a basis of proportional representation for all the parties represented in each. The difficulties which would obstruct such an ambitious scheme are well

illustrated by the contribution of Clarence K. Streit, whose closely reasoned lecture deals with the technical obstacles to any system of collective security which rests upon military collaboration by the general staffs of the countries concerned. Economic aspects of the problem are dealt with by several contributors, notably Professor Otto Nathan, of New York University, and R. J. P. Mortishead, of the I.L.O. Professor Nathan is skeptical about the possibilities of political appeasement through economic improvement, and he insists that a political solution must precede economic progress. Mr. Mortishead, on the other hand, presents a vigorous defense of economic nationalism as a necessary and valuable contribution to a world collective system. This rather novel point of view is based upon the argument that modern conditions necessitate economic planning within the state, and that this must precede the adjustment of international economic relations, which in turn will provide the necessary basis for political coöperation. A general summary of the present position of the League is provided by Stephan Osusky, Czechoslovak minister in Paris, but a much fuller and clearer discussion by the same authority is available in a recently published collection of lectures given at the *École Libre des Sciences Politiques* in Paris. In this symposium, published under the title *Problèmes de Politique Extérieure* (Paris: Felix Alcan), M. Osusky has brilliantly portrayed the relationship of the League to present-day Europe. Other lecturers in the series provide intelligent discussions of the problems of the Danube basin, the Rhine, and the Mediterranean.

In his *Plot and Counterplot in Central Europe* (Houghton-Mifflin Co., pp. xvi, 317, $3.50), M. W. Fodor paints a vivid picture of the chaos of forces that tend constantly to disturb the peace of central and southeastern Europe. Born a Hungarian, naturalized in England, as a newspaper correspondent intimately familiar with the major, and even the minor, personalities, groups, interests, rivalries, and feuds in that part of the continent, he was admirably equipped for the task he set for himself in this volume. He first surveys the scene in each of the several states and then describes certain common factors, such as the position of the peasants, the conflicting ideologies, and the impact of Fascist Italy and Nazi Germany upon the situation. The swiftness with which the scenes are changing is illustrated by a contrast of recent developments with the author's belief that the Henlein group was declining in importance in Czechoslovakia, that *Anschluss* was probably not an immediate threat, and that the spectre of a new German-Russian friendship loomed upon the horizon. On the other hand, he exhibits considerable perspicacity in pointing out, by implication or otherwise, that "red" terrors are easily surpassed in violence by "white" terrors, that the peasants profit by,

but do not participate in, or even favor, the revolutions of the Marxist urban proletariat, and that Italy is fundamentally weak. It is, of course open to question whether *Anschluss* will prevent or will hasten the collaboration of states to the east in the effort to preserve their political independence. Furthermore, is it not as reasonable to believe that England and France are pushing Germany over against Russia as to forecast Russian-German friendship? At any rate, the author does not fail to command sympathy when he casts a poignant glance back to the gentle, cultured humanitarianism of Socialist Vienna and contrasts it with the new barbarism that so savagely struck it down, being but one of the many examples of "white terrors" in the post-war world.—CHARLES A. TIMM.

Hanson W. Baldwin's *The Caissons Roll* (Alfred A. Knopf, pp. xvi, 323, ix, $2.50) presents a panorama of a continent gone mad with preparations for the war which "will come some day." It may come in 1939. It probably will come in the 1940's. But it surely will come "during the lifetime of the present generation." And it will be "totalitarian war" on an unprecedented scale, whether the states of Europe be politically totalitarian or not. Mr. Baldwin presents facts and figures as to the military position of all the states of Europe, and provides us with as accurate information as is currently available on this subject; but one is impressed with the incompleteness of the data available. How much are the Powers actually spending on instruments of war? Even a competent student of the subject, such as Mr. Baldwin, must often confess ignorance, and intelligent guessing is all that he has to rely on in estimating elements of military strength, especially in the totalitarian states. Although information on this subject tends rapidly to be out-dated, in view of the increasing tempo of military preparation, the author has cast it in a perspective which gives it more than merely passing usefulness. Geographical positions and alliance policies are discussed helpfully. The author reminds us that the real nature of the "next war" is "the unknown" that troubles the military men of Europe. It will probably set an all-time record for frightfulness, although one cannot be sure that civilian populations will be ruthlessly bombed. Fear of reprisals may operate as a deterrent. More than any other weapon, the airplane "has complicated not only the science of war but the science of diplomacy." The plans of Germany and Italy call for a swift and conclusive victory, but the war, after a period of maneuvering of machine against machine, will doubtless settle down into a stalemate of trench warfare. Like all wars of the past, the next war will probably end as "a war of man against man." There is good evidence to support this view. The book contains some useful tables, though it does not contain much hope for the future of mankind.—G. BERNARD NOBLE.

Problems of the Pacific, 1936 (University of Chicago Press, pp. vii, 470, $5.00), edited by W. L. Holland and Kate L. Mitchell, is in three parts. The first contains a summary of the discussions at the Yosemite Conference of the Institute of Pacific Relations. Use has been made by the editors, however, of the data papers prepared for the Conference, so that there is presented somewhat more than a mere summary of the discussions. The editing is skilfully enough done so that the reader does not get the fragmentary impression that a stenographic report might have given. Instead, he is given a careful survey of the aims and results of social and economic policies in the Pacific countries (the United States, Japan, the Union of Soviet Socialist Republics, and China), together with an incidental insight into the points of view of Canada and Australia. A fifth chapter in this section considers "the changing balance of political forces in the Pacific and the possibilities of peaceful adjustment." This indicates that there was more direction of discussion toward political, and thus controversial, problems of relationship than had previously been the case in the work of the Institute. The present struggle between China and Japan clearly reveals the justification for this slight shift of emphasis. The discussions themselves have a distinct value in helping to an understanding of the inevitability of the present struggle. The second section consists of six documents prepared for the Conference. This is only part of the documentation of the Conference, and it may be assumed that these particular data papers were selected for publication because of their timeliness and value in relation to the existing situation. They cover: (1) trade and trade rivalry between the United States and Japan; (2) factors affecting the recent industrial development of Japan; (3) the resources and economic development of the Soviet Far East; (4) recent developments in the Chinese communist movement; (5) the reconstruction movement in China; and (6) the working of diplomatic machinery in the Pacific. Number 4, it is stated, represents an editing of the original data paper, and it has been included not so much because of the authority of treatment of the subject of Chinese communism as because "it illustrates some of the views held by certain sections of the Japanese public" on the subject. The third part—appendices, under six heads—gives information concerning the Conference organization and personnel.—HAROLD M. VINACKE.

Aside from those who are particularly interested in the detailed study of Japan's population trends, few scholars will find much that is new in Ryoichi Ishii's *Population Pressure and Economic Life in Japan* (University of Chicago Press, pp. xix, 259, $3.00). This is not written in disparagement of Dr. Ishii's work. The demographic data which he has assembled are remarkably complete and draw heavily from valuable Japanese sources. The volume as a whole should be of the greatest interest

to students of the population problem everywhere. But the author's general conclusions with respect to the interrelationship of Japan's population problem, on the one hand, and the rural economic situation, the food supply, the emigration problem, and the trend toward industrialization on the other, follow rather closely the well-worn grooves recently travelled by Freda Utley. Despite a declining refined birth-rate, Dr. Ishii estimates, Japan must look forward to a population of perhaps ninety million by 1960. The country's food supply, adequate at present though produced at high cost, will scarcely meet the country's needs unless a delicate balance is preserved between a number of factors: imports of cheaper colonial rice, the purchasing power of both the rural and urban masses for the commodities produced by the other, the tendency toward rationalization of agriculture, and the extent of urbanization. Efforts to encourage emigration have been generally unsuccessful, in that less than 1,000,000 Japanese—the number of one year's natural increase at home—have been transplanted to colonies or foreign territory. And the possibilities for further absorption of population in industry are severely curtailed by trade restrictions abroad and the relatively small utilization of man-power in a thoroughly rationalized industrial organization. The pressure of population, then, will probably force Japan toward what Dr. Ishii, in understandably cautious phraseology, designates as a "re-evaluation and re-distribution of wealth," or a "re-evaluation of the social system." Revolution, in short, is the fruit of Japanese fertility. It is to be regretted that the author did not carry his analysis one step further—to a description of the extent to which the center of gravity of Japan's industry as a whole is shifting away from light export enterprises toward undertakings relying upon a steady flow of orders from the Japanese military. For this shift, in its reciprocal relationship with the growth of authoritarian and militaristic tendencies in Japan, bids fair to accelerate the development of the social instability which is the prelude to revolutionary change.—DAVID H. POPPER.

In *Latin America; Its Place in World Life* (Willett, Clark, and Company, pp. vi, 462, $3.75), Mr. Samuel G. Inman's purpose is to "present an outline of the history and an interpretation of the life of Hispanic America" for the general reader in the United States. For many years a warm admirer of the best sides of Latin American culture, he describes contemporary intellectual movements south of the Rio Grande from a point of view which, as he indicates in his introduction, is almost more Latin American than North American. This fact by no means detracts from the interest of the book. Even those who disagree with the author's general attitude will find it well worth reading, because it is one of the few studies which have gone beyond generalities in discussing some of

the great forces which are vitally affecting the social and political life of our southern neighbors and creating problems of increasing importance in their relations with us. Though the introductory chapter on "Perspectives and Character Molds" might be studied profitably by anyone who plans to visit Latin America, the first half of the book in general will be less interesting to the student of Latin American affairs than the second. The historical chapters suffer from the over-generalization inevitable when one tries to condense the story of twenty different countries into a relatively few pages, and the historian will question the accuracy of some of the author's statements. On the other hand, parts of the chapter on "Population Tendencies," and especially the discussion of some of the very recent developments affecting foreign immigrants, are interesting. The second half of the book deals with "New Forces" and the prospect for the future. The most interesting chapters, perhaps, are those on "Students" and "Communism." In the first of these, the author describes "a major social movement affecting the whole continent . . . symptomatic of leftist protest against the old order everywhere." As to communism, the author believes that it "has developed little strength of its own in Latin America," but that communist influence may increase in the future if liberal and other radical elements join with it in a struggle against present-day reactionary tendencies. "Labor," "Spiritual Renaissance," and recent developments in international coöperation are also discussed. The book ends with an effort to look into the future. Recent changes in Mexico and Uruguay are described, to suggest what may happen elsewhere, and a series of quotations from Latin American writers gives a picture of the trend of revolutionary thought in other countries.—DANA G. MUNRO.

In *The Study of International Relations in the United States: Survey for 1937* (Columbia University Press, pp. xxvii, 540, $3.50), Miss Edith E. Ware revises the survey under the same title which she prepared for 1934. She groups the agencies and methods into several major divisions. Some encourage and conduct research, hundreds of formal educational institutions offer courses in the field, some agencies specialize in limited areas, adult education programs are adding the subject, and international institutes and associations work ceaselessly. The multiplicity of these agencies and methods is evidenced by the fact that the directory-index covers fifty pages of small type. In view of this vast array of foundations, institutes, councils, associations, religious groups, journals, conferences, forums, courses, seminars, and research, it may be asked what are the results to date. To this question the author ventures no reply; nor can a definite reply safely be given. It is doubtful, however, if even yet the great mass of the population has so much as been reached, much less

influenced. It may take decades to arrive at that goal. As yet, over one hundred colleges, not to mention the secondary schools, seem to offer little or nothing in this vital field. The author renders a valuable service in presenting this survey and in showing the needs still to be met. It is interesting to note that institutions emphasizing military training tend to minimize course offerings that might be regarded as preparation for the non-forcible maintenance of peace.—CHARLES A. TIMM.

The Legal Status of Aliens in Pacific Countries (Oxford Univ. Press, pp. xii, 363), edited by Norman MacKenzie, of the University of Toronto, is a collection of studies prepared under the direction of a sub-committee of the International Research Committee. Though less complete than the sub-committee had originally desired, the papers make a very real contribution to the literature on the subject of the legal and political position of aliens in peace-time in eleven countries bordering the Pacific Ocean. The countries are Australia, Canada, China, Indo-China, Pacific dependencies of Great Britain, Japan, Netherlands East Indies, New Zealand, the Philippine Islands, Russia, and the United States. The studies, though varying somewhat in scope and emphasis, deal with such matters as immigration, naturalization, deportation, property rights, access to courts, political rights, professional and occupational rights, hunting and fishing privileges, and rights to public relief and social security benefits. Disabilities and restrictions are given appropriate attention, and the essentials of alien rights are so set forth as to be of value both to the student of the problem and to the general reader. The authors of the papers are prominent professors, lawyers, research men, and government officials in their respective countries. One misses especially papers on Mexico and the other Latin American countries, but is grateful for those which do appear.—N. D. HOUGHTON.

John M. Mathews has recently revised and expanded his *American Foreign Relations* (Appleton-Century, pp. xvi, 766, $4.00) so as to make this excellent and authoritative text the most up-to-the-minute general survey in the field. A thirty-seven-page introduction to the importance of international relations in general is followed by a short chapter on the historical development of American foreign policy and 263 pages (in nine chapters) of discussion of both the principles and the content of specific policies such as those relating to the Monroe Doctrine, the Caribbean area, the Panama Canal, Pan-Americanism, the Far East, the League of Nations and the I. L. O., the World Court, peace and disarmament, and neutrality. Part II consists of twenty-one chapters on the organization of American government machinery and its methods of procedure and practice in the conduct of our foreign relations. Fifty pages of appendices

(containing pertinent documents and discussions of certain topics) and a good index complete a text that is bound to be as useful as it is readable for students, teachers, publicists, and laymen.—J. VAN DER ZEE.

POLITICAL THEORY AND MISCELLANEOUS

Professor A. C. Pigou has succeeded in banishing from his discussion, in *Socialism versus Capitalism* (Macmillan and Co., pp. 139, $1.75), every trace of moralizing, conscious or unconscious, every adherence to a particular *end*, and in demonstrating that economics is purely a science of *means*. As an example of the first mentioned, he rejects the term profit *motive* from his basic definitions of capitalism and socialism, though naturally making them turn on the *fact* of profit. He affirms socialism's superior ability to equalize the distribution of wealth, since a capitalist society, while theoretically capable of going very far in that direction through taxation and social legislation, is practically held back by its dependence on capitalists as savers and investors. A socialistic society is also superior in combating unemployment, since, being in control of the whole volume of investment, it can be more effective in transferring resources from capital-making industries (the industries especially susceptible to expansion and contraction) to industries making consumer goods, and it can also remedy more readily the "stickiness" of money wage-rates. Professor Pigou brings out that capitalism's score in respect to an "appropriate" allocation of productive resources (that is, in harmony with its distribution of income) is far from brilliant and that socialism could do at least as well, and similarly arrives at an indecisive outcome in the discussion on the relative technical efficiency of both systems.

The most valuable parts of the book are those dealing with the allocation of productive resources under capitalism and socialism in the pursuit of the economic principle and with the problems of central planning and the rate of interest under socialism. These chapters prove how theoretical economists may be the best friends of the socialists. Pigou shows how by bringing in an *accounting wage*, an *accounting rent*, and an *accounting rate of interest*, a socialist state might realize the economist's ideal—although he is not very sanguine that the theoretical possibility will become an actuality. When he abandons his rôle of strict scientist to give us his own program, he is found advocating the program of the social service state, including a gradual nationalization of industry. But for him "gradualness" is not "a polite name for standing still."—SELIG PERLMAN.

No rule as to the critic's duty not to extend lavish praise will preclude saying that E. H. Carr has written a highly successful biography of *Michael Bakunin* (Macmillan and Co., pp. x, 501, $6.50)—the first extended account in English, and to be accepted at once as standard. With

its lucid, direct, and absorbing presentation, and its sufficiency of scholarly documentation, it seems no exaggeration that the book has been called "the best picture ever painted of revolutionary politics in nineteenth-century Europe." No picture presents all sides of the reality. The influence of Karl Marx in the end looms larger than that of Bakunin, but the famous rival of Marx was more nearly the center of European revolutionary movements in the last century. Did a greater contradiction ever exist than Bakunin—a stranger union of courage and cowardice, of aristocratic with bohemian and proletarian sympathies, of unreasoning violence with the reason of perpetual peace, having no need of the coercive state, and of personal degradation with a consistency of moral principle in the conduct of life that will sacrifice aught else? The author makes this physical giant, this emotional and in his own way intellectual giant, live through five hundred pages of sustained scientific detachment, of occasional humor, of true appraisal of the naïve, self-delusive, even ridiculous, yet magnificient, personality of the founder of anarchism. If the reviewer would suggest doubt at all upon any point of the author's few personal observations, it would be only upon the extreme of romanticism (an afterglow of the life of Bakunin himself?) reflected in the philosophy of liberty, as when it is said that "Bakunin is one of the completest embodiments in history of the spirit of liberty—the liberty which excludes neither license nor caprice, which tolerates no human institution, which remains an unrealized and unrealizable ideal, but which is almost universally felt to be an indispensable part of the highest manifestations and aspirations of humanity" (p. 440). This, as perhaps the author only does not *say*, is but one side of the freedom, that "spirit of liberty," which is nothing divorced from a self-control, social as well as individual.—WALTER SANDELIUS.

When a professor of education finds extensive evidence of an "innate pedagogical cussedness which tempts teachers to substitute transitory interests in devices and petty projects for the deep and abiding sense of values that comes from focusing the attention on basic social problems," and when, frankly recognizing the widespread antipathy both of academic faculties toward courses in methods and of education faculties toward content fields, he impartially concludes that "the debates between these two hostile camps are marked more by emotion and prejudice than by critical thought and openmindedness," then political science teachers may hopefully examine his criticism of methods of instruction in the social sciences. However, they should not read Ernest Horn's *Methods of Instruction in the Social Studies* (Charles Scribner's Sons, pp. xix, 523, $2.50) immediately after reporting the grades of their students, unless they are both tough-minded and determined to devise means for more

effective instruction. They must be prepared to discard the easy assumption that because material of a course is meaningful to them, it must also be meaningful to their students. While the author is primarily concerned with instruction below the college grade, his critical analyses help both to explain the learning difficulties of those enrolled in college courses and to indicate how collegiate instruction may to some extent make amends for previous inadequacies. Perhaps the most significant conclusion from the many-sided investigation—ranging from problems arising from individual differences in experiential background and ability, through the nature of understanding, reading in relation to learning, and the value of textbooks, to devices for stimulating the imagination and means to facilitate retention for future use—is his "insistent emphasis upon the reduction of the amount to be learned." Political scientists, specialists in their own field, should readily acknowledge the qualifications of Professor Horn, who has specialized in methods of instruction, to say how much can be taught effectively, and should coöperate with him and other competent scholars in that field to "determine the fundamental equipment of ideas, attitudes, and methods of work that are most generally useful in the attack on social questions."—HOWARD WHITE.

In *The Labor Movement in America* (W. W. Norton and Co., pp. 208, $2.00), Marjorie R. Clark and S. Fanny Simon have presented a summary partisan account of the grievances of American labor since the beginning of the factory system. Forces retarding the progress of labor reform have been the capitalist employers, unsympathetic courts, and the unwillingness of many workers to regard themselves as "wage-earners," or to participate in union movements, because of their belief in the myth that America is still a land of opportunity for the individual. The authors forcefully point out that although considerable gains have come through political channels since the launching of the New Deal, improvements in working conditions have been effected mainly through economic pressures which organized labor has applied to employers. Since there can be no satisfactory solution for labor's problems in a capitalist system until the wage-earning class is organized strongly enough to command a bargaining power which employers will be powerless to resist, intermittent controversies between industrial and craft unionists are viewed as unhappy affairs. It seems doubtful, however, whether the authors have any real understanding of the course that labor should follow in the future. They have not ventured to suggest a way out of the present controversy between the industrial and craft unionists. Neither have they submitted convincing evidence to support their implicit thesis that the capitalist system will function tolerably under democratic government if and when wage-earners present a united front; nor have they considered the social

readjustments which would be made necessary by the establishment of the wage-earning class as the dominant social group in America. This book will be disappointing to persons who are unwilling to accept an unsupported assumption that unionization is the ultimate answer to the modern problems of labor.—ALDEN L. POWELL.

In his *European History Since 1870* (F. S. Crofts and Co., pp. xvi, 925, $4.50), F. Lee Benns has condensed his earlier text *Europe Since 1914*, brought the material up to date, and prefaced the account with the story of Western Europe since 1870. His new book thus fills the needs of a larger number of college history courses. The purpose of the book is to present the history of Europe since 1870 so as to give the reader a clear insight into the economic, social, diplomatic, and political forces which led to the World War and an appreciation of the profound developments which have occurred since the war. The reviewer believes that the author has succeeded. Two-thirds of the book deals with the World War and the contemporary scene. The volume is written in the author's usual clear style and with his usual accurate scholarship. It has a copious index and a judiciously selected bibliography.—J. H. LANDMAN.

RECENT PUBLICATIONS OF POLITICAL INTEREST
BOOKS AND PERIODICALS

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AMERICAN GOVERNMENT AND PUBLIC LAW

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